



## ENVIRONMENTAL QUALITY COUNCIL

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(406) 444-3742

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ENVIRONMENTAL  
ANALYST  
Todd Everts

May 9, 2001

TO: ENVIRONMENTAL QUALITY COUNCIL

FROM: Larry Mitchell, staff *LM*

RE: Meeting Agenda Item IX - Big Hole and Beaverhead River Management Rules

Pending completion and adoption of final river management plans, the Montana Fish and Game Commission has adopted biennial rules for the use of these rivers that place seasonal limits on river use by commercial outfitters and others. The most recent rule was adopted February 9, 2001 and is effective from May 2, 2001 through May 1, 2003.

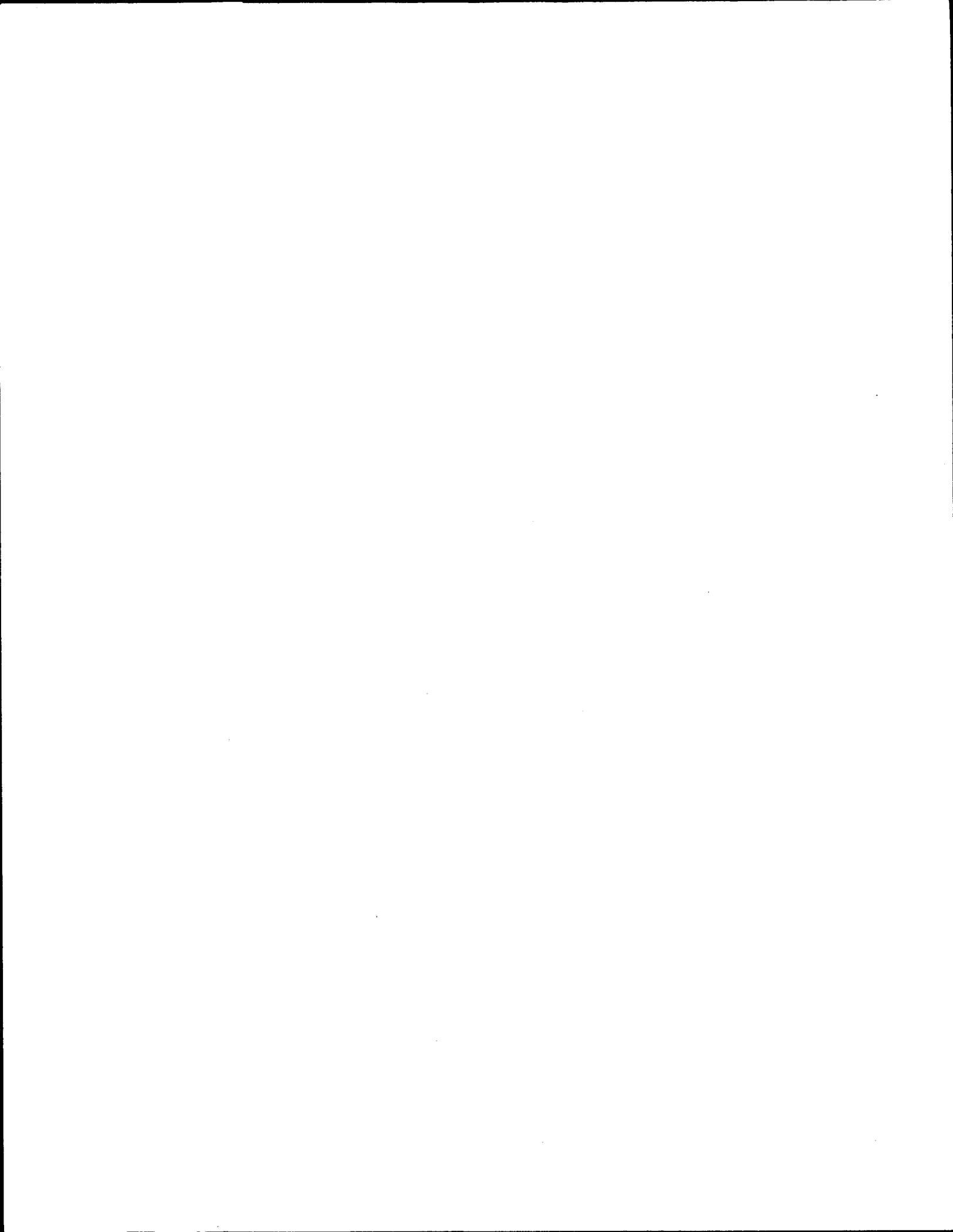
Mr. Tomas Anacker, representing the Fishing Outfitters Association of Montana (FOAM), has objected to these rules through the Governor's office. With the enclosed letters, both FOAM and the Governor have asked the EQC to review the Commission's rules under the Council's statutory authority for agency rule review and program evaluation. [See the enclosed *A Council Member's Guide to the Environmental Quality Council*, pp E-5 through E-8 and E-26(10)].

As background information for this agenda item, I have enclosed the following:

- 1) Anacker letter and package including the Governor's request, EQC response and citizen comments to the EQC,
- 2) An opinion from Mr. Greg Petesch, legislative services division legal services director, that analyzes the Fish and Game Commission's authority to adopt the biennial rule and the EQC's authority to review the rule pursuant to the Montana Administrative Procedure Act,
- 3) A package of information from the Department of Fish, Wildlife, and Parks that includes a response to the issue, the two biennial rules, timelines and public process descriptions for the rules, and other information, and
- 4) HB 636 from the 1999 session.

It is anticipated that the EQC will take action on this agenda item during the May 24 meeting. If you have any questions about this topic, don't hesitate to contact me.

[lamitchell@state.mt.us](mailto:lamitchell@state.mt.us) 406-444-1352



**ANACKER LAW OFFICE**  
ATTORNEY AT LAW

**EXHIBIT #9**

THOMAS R. ANACKER, P.C.

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P.O. BOX 1247  
BOZEMAN, MONTANA 59771-1247

TELEPHONE: (406) 586-9111  
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February 7, 2001

Environmental Quality Council  
c/o Todd Everts  
State Capitol, Rm. 171  
P.O. Box 201704  
Helena, MT 59620-1704

Re: River Management Biennial Rules

Dear Environmental Quality Council Members:

My office has been retained by the Fishing Outfitters Association of Montana (FOAM) to assist them in addressing the improper adoption, by the Department of Fish, Wildlife & Parks (Department), of a River Management Biennial Rule for the Big Hole and Beaverhead Rivers, the proposed adoption of a replacement River Management Biennial Rule, and adoption of a Commission Policy for the Development of Management Plans and Regulations to Address Recreational Conflicts on Rivers (Policy). By way of background, the Department originally adopted a Biennial Rule in June of 1999 to regulate social conflicts on the Big Hole and Beaverhead Rivers. The Department did not follow the Montana Administrative Procedures Act (MAPA) when they adopted the Biennial Rule. The statutory authority relied upon by the Department to regulate the social conflicts was Mont. Code Annot. Section 87-1-303, which had recently been amended by the 1999 Legislature. The Department is relying on the 1999 amendment as a basis for their authority to act. The Department also relied upon the same statutory authority to enact its Policy, which was adopted in June of 2000. MAPA provisions were not followed during the enactment of the Policy.

In early January of 2001, the Department proposed a replacement Biennial Rule for the management of the Big Hole and Beaverhead Rivers. As with the prior Biennial Rule, the Department is proceeding without following the procedural provisions of MAPA and is relying on §87-1-303, MCA, as authority for their proposed action.

My review of this matter has disclosed two serious legal deficiencies with the process followed by the Department:

1. The Department is legally bound to follow MAPA is enacting rules and policies. The subject matter of the Rule and the Policy is of significant public interest and deals with matters significantly broader than the seasonal recreational use of land and water, e.g., regulation of the guiding and outfitting industry.

EQC  
February 7, 2001  
Page 2

2. The intent of the 1999 Legislature in amending §87-1-303, MCA, was to grant the Department the authority to set speed limits for motorized water craft under circumstances where safety was not the primary issue. It is improper for an agency to bootstrap language that is amended into a statute for one intended purpose and utilize that language for purposes not intended by the Legislature.

A review of the legal deficiencies is more fully discussed in the attached Memorandum.

FOAM requests that the Environmental Quality Council, in its capacity as the Rules Committee for the Department pursuant to § 2-4-402, MCA, review the existing and proposed River Management Biennial Rules and the Policy. We submit that the Council will determine that the procedural basis and statutory basis for the adoption of the Rules and the Policy is legally deficient. We request that the Council, following its review, issue a written objection to the Biennial Rules and the Policy to be sent to the Department, and if the Department fails to take appropriate action, that the objection be filed with the Montana Secretary of State according to law.

FOAM firmly believes that it is appropriate to address the legal deficiencies in the Rules and the Policy at this time. The purpose of legislative rules committees is to provide quality control for agency rulemaking. It is much more efficient to correct errors in the rulemaking process midstream rather than waiting until a flawed rule is adopted and is being enforced.

Thank you in advance for your prompt attention to this matter.

Very truly yours,

ANACKER LAW OFFICE



Thomas R. Anacker

TRA/tra

enc.

cc: FOAM

25-00-A

**Memorandum**

**TO: Administrative Rules Committee (Environmental Quality Council)**

**RE: Fish, Wildlife & Parks River Management Biennial Rules**

**DATE: January 29, 2001**

Section 2-4-402, MCA, provides that the Administrative Rules Committee ("Committee") may review proposed rules to ensure compliance with Sections 2-4-302 through 2-4-305, MCA, of the Montana Administrative Procedures Act ("MAPA"). Following the review, the committee may prepare written recommendations for the adoption, amendment, or rejection of a rule. In addition, the Committee may require the department proposing the rule to follow the provisions of MAPA.

Section 2-4-406, MCA, provides that if the Committee objects to all or part of a proposed rule, the Committee shall send a written objection to the agency promulgating the proposed rule. If the Committee continues to object to the rule following a response to the Committee's objection by the promulgating agency, the Committee may file the objection with the office of the Secretary of State. Once the objection has been filed with the Secretary, the promulgating agency bears the full burden of defending the proposed rule. If a court invalidates the rule because the agency failed to follow the provisions of MAPA or arbitrarily and capriciously adopted the rule in disregard of the purposes of the authorizing statute, the agency is subject to an award of costs and attorney fees against it.

On June 29, 1999, the Fish, Wildlife & Parks Commission ("Commission") adopted a final Biennial Rule for the Interim Distribution of River Recreation Use and Recreation Resource Management Plans for the Beaverhead and Big Hole Rivers. (A copy of the Biennial Rule is attached hereto as Exhibit "A"). This Biennial Rule was adopted under an "exception" to MAPA. This exception is found at Section 2-4-102 (11)(d), MCA, and provides in pertinent part that a proposed rule is excepted from MAPA when the subject matter of the proposed rule relates to seasonal recreational use of land and water and the substance of the rule is indicated to the public by signs or signals. The Commission proposes to supercede the original river management Biennial Rule with an updated version. (A copy of the proposed river management Biennial Rule is attached hereto as Exhibit "B"). As with the original Biennial Rule, the Commission has invoked the seasonal recreational use exception to avoid following MAPA procedures for the proposed rule.

In the text of the Statement of Legal Authority for Rule for both the original and proposed Biennial Rules, the Commission indicates it is relying on Section 87-1-303, MCA, as the legal authority to adopt the river management rule. With respect to the original Biennial Rule, the Commission relied on the amendments to Section 87-1-303, MCA, provided by the 1999 Legislature in House Bill 626 ("public welfare" language) as the authority to manage social conflicts on rivers unrelated to biological issues.

Objection has been raised to the seasonal recreational use exception to MAPA utilized by the Commission in its adoption of the original and proposed Biennial Rules. By their very nature, exceptions to rules are limited. Without this limitation, the reason for the rule would cease to

exist. In this case, the exception relates specifically to "seasonal recreational use of lands and water". However, the Biennial Rule deals with a much broader subject matter. For example, the Rule goes well beyond recreational use when it establishes regulations on the commercial activity of the guide and outfitter industry. In addition, the rules sets forth regulations for the protection of private property. The areas where the Commission has gone beyond the scope of the exception to MAPA rulemaking procedures are issues that are of significant public interest and any rulemaking in these areas must be subject to MAPA procedures. It is submitted that the Commission has failed to substantially comply with the provisions of Sections 2-4-302 through 2-4-305, MCA. Agency rules which are adopted in violation of MAPA are invalid. *Rosebud County v. Department of Revenue*, 257 Mont. 306, 310, 849 P.2d 177, \_\_\_ (1993) and *Northwest Airlines, Inc. v. State Tax Appeal Board*, 221 Mont. 441, 445, 720 P.2d 676, \_\_\_ (1986).

Further objection has been raised that the Commission does not have statutory authority to enact social conflict rules. Prior to 1999, the Commission and the Department of Fish, Wildlife & Parks held the position that they were without authority to enact rules that affected social conflicts absent a biological basis for the rules. HB 445 was introduced in the 1999 Legislature with the purpose and intent to authorize and empower the Commission to enact social conflict rules, through a consensus process, on the Beaverhead and Big Hole Rivers. (A copy of HB 445 is attached hereto as Exhibit "C"). However, this bill was vetoed and did not make it into law.

HB 626 was also introduced in the 1999 Legislative session. The intent and purpose of this bill was to regulate conflicts between motorized and non-motorized use on streams and lakes. (A copy of HB 626 is attached hereto as Exhibit "D"). This bill was amended to add the term "public welfare" to the language of Section 87-1-303, MCA. A review of the proceedings before the legislative committees establishes that this language was inserted into HB 626 to give the Department of Fish, Wildlife & Parks the authority to enact speed limits on motorized craft for reasons other than safety considerations. No intent by any of any legislator serving on the House and Senate Fish and Game Committees is disclosed in the record that the "public welfare" language was intended to authorize the Department to enact social conflict regulation outside the narrow scope of speed limits on motorized craft. (Copies of the tapes from the 1999 committee hearings and type written minutes are attached hereto as Exhibits "E" and "F" respectively). Section 2-4-506 (2), MCA, authorizes a court to declare a rule invalid if it was adopted with an arbitrary and capricious disregard for the purpose of the authorizing statute. An inspection of the intent statement contained in HB 626 and a review of the legislative record clearly shows that the amendments to Section 87-1-303, MCA, were never intended to authorize the Commission to embark on the social conflict rule making contained in the original and proposed Biennial Rules.

In summary, the Commission has failed to follow the rulemaking procedures contained in Sections 2-4-302 through 2-4-305, MCA, in dealing with a subject matter that is of significant public interest and has arbitrarily and capriciously disregarded the purposes of the authorizing statute they are relying on. Appropriate grounds exist for the Committee to prepare and deliver an objection to the agency concerning the existing and proposed Biennial Rules for failure to follow MAPA and for disregarding the legislative purpose of the 1999 amendments to Section 87-1-303, MCA.

OFFICE OF THE GOVERNOR

STATE OF MONTANA

JUDY H. MARTZ  
GOVERNOR



STATE CAPITOL  
PO Box 200801  
HELENA, MONTANA 59620-0801

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FEB 20 2001

**ENVIRONMENTAL  
QUALITY COUNCIL**

February 16, 2001

Environmental Quality Council  
Room 106 State Capitol  
Helena, MT 59620

EQC Members:

I have reviewed the arguments presented to the Environmental Quality Council on behalf of the Fishing Outfitters Association of Montana (FOAM). In their written arguments regarding the rulemaking authority granted to the Fish, Wildlife and Parks Commission, FOAM refers to HB 626, signed into law by former Governor Marc Racicot.

Having reviewed FOAM's arguments and HB 626, I believe there are credible questions as to the Fish, Wildlife and Parks Commission's authority to develop rules based on social concerns.

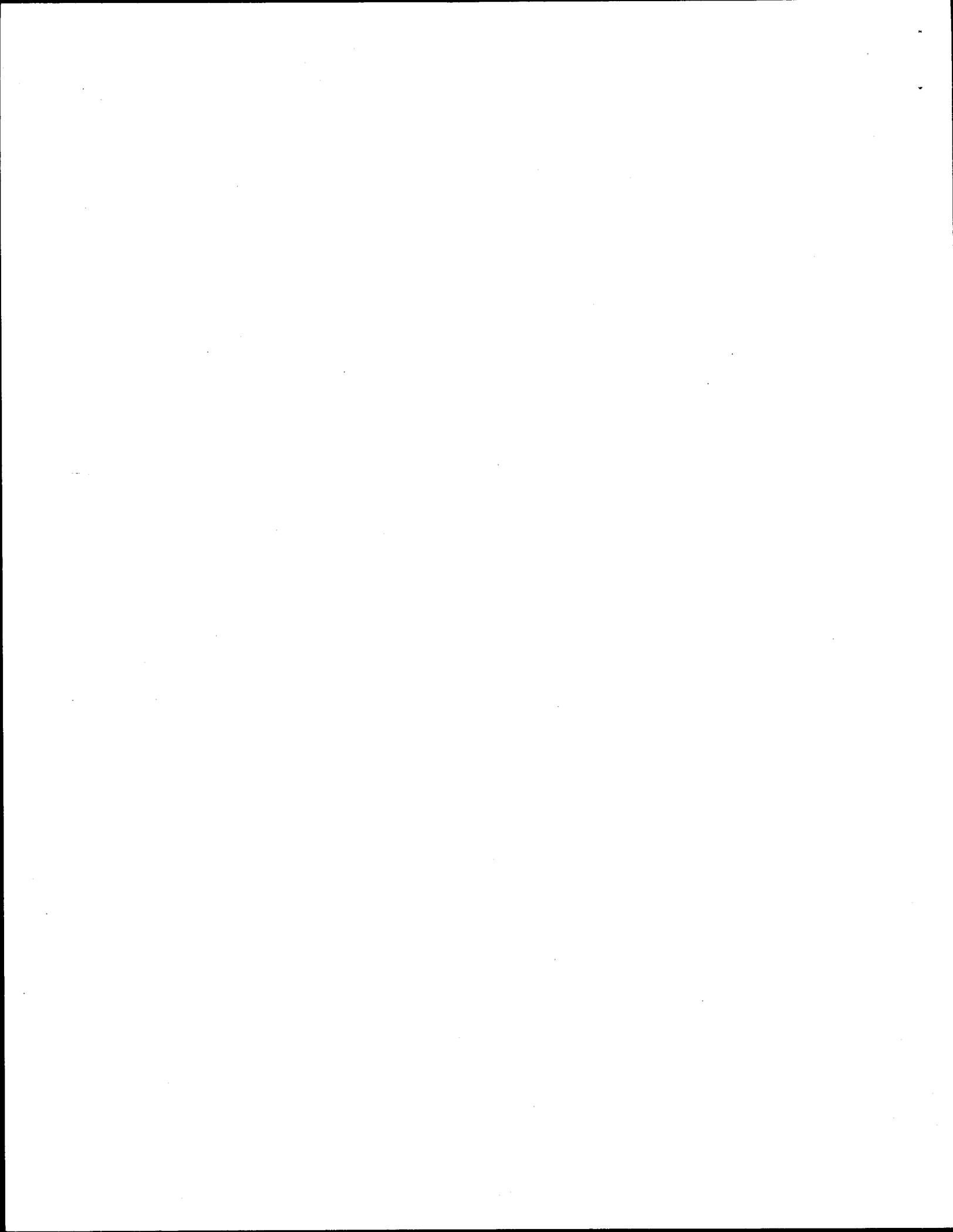
I encourage the Environmental Quality Council to review the legal arguments presented by FOAM and base their decision upon a legal interpretation of the subsequent legislation. In an effort to clear any cloud surrounding the authority by which the Fish, Wildlife and Parks Commission is developing rules pursuant to this issue, I encourage the members to render a decision regarding the legal and appropriate authority by which the Fish, Wildlife and Parks Commission has derived its authority.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Judy Martz".

JUDY MARTZ  
Governor





# ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704  
HELENA, MONTANA 59620-1704  
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LEGISLATIVE  
ENVIRONMENTAL  
ANALYST  
Todd Everts

February 21, 2001

The Honorable Judy Martz  
Governor of the State of Montana  
State Capitol  
PO Box 200801  
Helena, MT 59620-0801

Dear Governor Martz:

I appreciated receiving your letter encouraging the Legislative Environmental Quality Council (EQC) to review the Fish, Wildlife, and Parks Commission's rulemaking authority pursuant to 87-1-303, MCA and specifically as it relates to the proposed adoption of a replacement River Management Biennial Rule for the Big Hole and Beaverhead Rivers and the adoption of a Commission Policy on the Development of Management Plans and Regulations to Address Recreational Conflicts on Rivers. At issue, as I understand it, is whether the Commission has the authority to adopt a policy and promulgate rules to regulate social conflicts on the Big Hole and Beaverhead Rivers.

As you know, the Legislature has very specific and limited administrative rule oversight authority pursuant to 2-4-401 through 2-4-412, MCA. Given that authority, I have directed our Legislative Division staff, as time allows during this hectic legislative session, to begin researching this issue and to report back to the EQC before the end of the legislative session.

At your convenience, I also think that it would be very helpful for me and the Vice Chair of the EQC, Representative Kim Gillan, to sit down with you and your staff and Jeff Hagener to discuss the issues that you have raised.

I look forward to working with you and your administration on this matter.

Sincerely,

Senator Bill Crismore  
Chairman of the EQC

cc: **EQC Members**  
**Jeff Hagener, Director of the Department of Fish, Wildlife, and Parks**  
**Thomas Anacker, Attorney at Law**  
**Robin Cunningham, FOAM**

Allen Schallenberger  
53 Elser Lane  
Sheridan, MT 59749-9604  
406-842-5134  
E-mail [exprnzmmt@3rivers.net](mailto:exprnzmmt@3rivers.net)  
Feb. 23, 2001

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FEB 26 2001

**ENVIRONMENTAL  
QUALITY COUNCIL**

Senator William Crismore  
Chairman Environmental Quality Council  
PO Box 201704  
Capitol Building  
Helena, MT 59620-0901

Dear Senator Crismore:

I am writing to ask that you look into the outrageous rule making by the FWP Commission, which removes small outfitters such as myself from the Big Hole and Beaverhead Rivers. Their authority to do this is very questionable, as have been their actions in the rule making process. Specifically what harms me the most was their decision arising for the first time on Jan. 29, 2001 to restrict outfitters to the use days they had in June and July on the Big Hole and according to the paper June, July and August on the entire Beaverhead. See enclosed reports for more info on the problems on these rivers

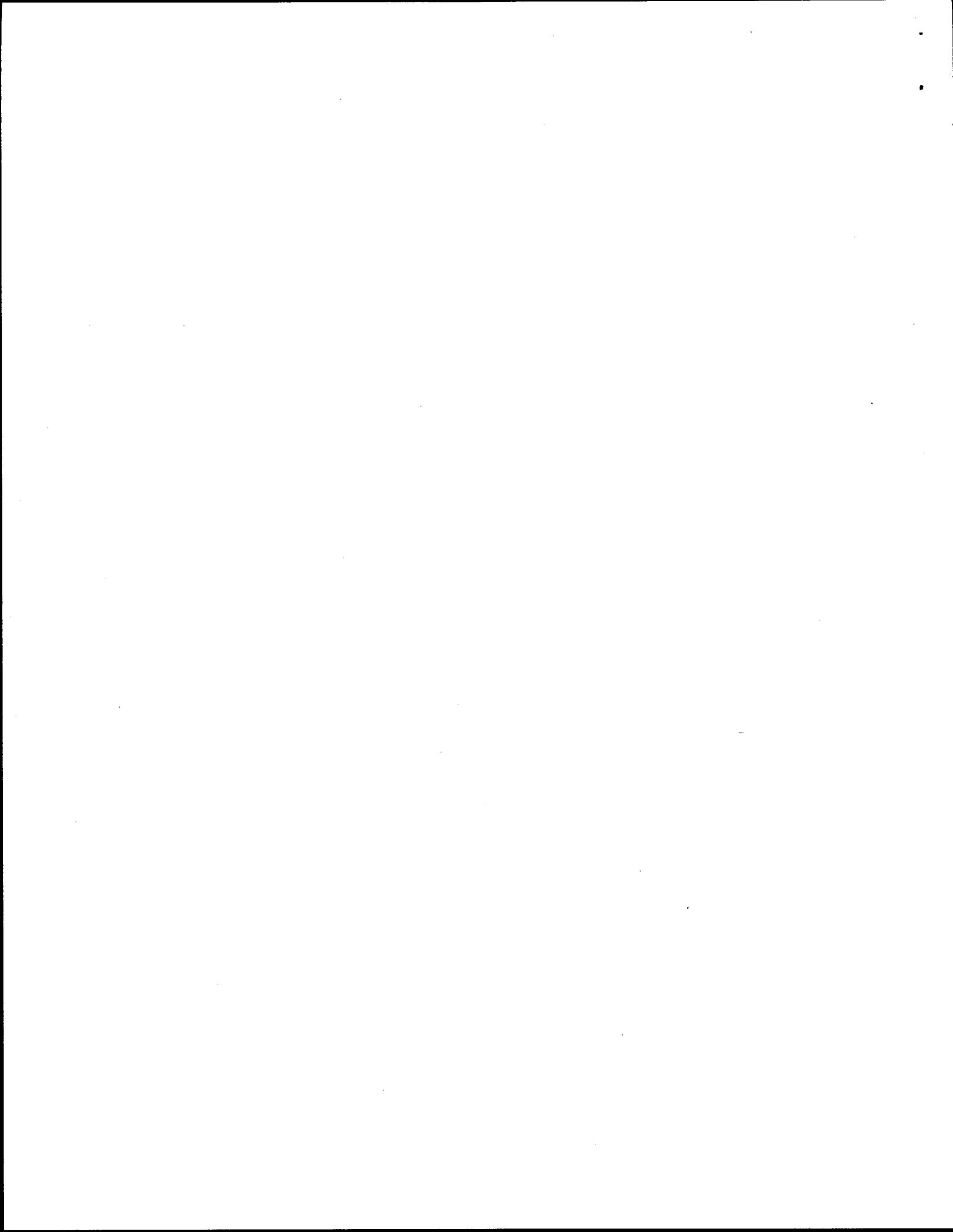
Since 1980, I have had a bad leg and have had to cut back on hard work such as ranching which I got out of in 1990. I am a 5<sup>th</sup> generation native with my family moving to Montana territory in 1881. I am capable of rowing a raft or boat well on our rivers and have been doing that since 1990. I have worn a leg brace since the mid-1980's and by 1998 it was worn and needed replacement. That year and the following year I reduced my advertising to save money for the orthopedic treatment, physical therapy and a new brace and therefore had less river use. The pain was severe in 1999 until I got the new brace so could do very little walking. In 2000 we were hit with drought conditions in early June so I made all my fishing trips to the Madison. Also in 2000 the fires badly affected our potential clientele and my Mother had several heart attacks. That cut back in my availability for outfitting, as I had to spend about one month on several trips to Spearfish, SD where she lives arranging for her care.

Please help with this problem and let me be a productive business owner for at least another 10 years when I'll be 70 years old and may have to cut back on rowing boats which is not easy but I enjoy it. Then I'll have to go to work in my wood shop full time, as I'll never be able to retire.

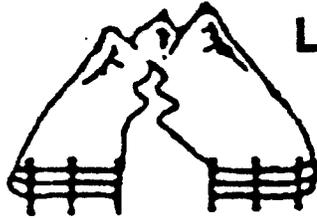
Sincerely,

  
Allen Schallenberger

c. Todd Everts



**PUBLIC  
LANDS  
ACCESS  
ASSOCIATION, INC.**



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MAY 02 2001

**ENVIRONMENTAL  
QUALITY COUNCIL**

Post Office Box 2 ■ Ramsay, Montana 59748-0002

Sen. William Crismore, Chairman  
Environmental Quality Council  
P.O. Box 201704  
Helena, mt. 59620-1704

29 April 2001

Dear Sen. Crismore:

Our organization and Anzcondz Sportsmen's Club fully endorse the comments submitted by the Big Hole River Watershed Committee and the George Grant Chapter of T.V. Their analysis of the law, H.B. 626, is excellent and states our case clearly and positively. The time ranchers and recreationist put a lot of time and thought into their support of some type of regulations to protect private property, the river resources and the rights of all concerned, this vast amount of time and expended energy should not be wasted.

The regulations proposed by the Commission should be allowed to stand - they are just and reasonable and fair to all.

Your consideration in this important matter will be greatly appreciated.

Sincerely,  
Larry Schooner  
Sec. - Treas.





## **Big Hole Watershed Committee**

Box 320003 Glen, MT 59732

**RECEIVED**

April 19, 2001

APR 25 2001

Senator William Crismore  
Chairman  
Environmental Quality Council  
PO Box 201704  
Helena, MT 59620-1704

**ENVIRONMENTAL  
QUALITY COUNCIL**

Re: HB626 Authority Review

Dear Senator Crismore:

The Big Hole Watershed Committee would like to offer the following comments regarding the recent questions to the Environmental Quality Council calling for a review of the Fish, Wildlife and Parks Commission's (FWP) authority to regulate social conflicts on Montana Waters.

The EQC has been asked to review of the statutory basis and the procedural basis for adoption of regulations to resolve social conflicts. The BHWC has been an active participant on river conflict issues for the past three years. Hundreds of hours have been spent in a collaborative, multi-stakeholder process to develop the Big Hole Recreation plan. Our involvement and research during the past three years has been extensive. We believe that HB626 contains all of the necessary authority required for FWP to issue regulations resolving crowding and conflict on the Big Hole and Beaverhead Rivers and that FWP followed the proper procedure. We will address each of the current questions separately.

**Issue #1** Does HB626 did not contain the necessary authority for FWP to enact regulation outside the narrow scope of speed limits on motorized craft?

YES. Section 87-1-303 (2), MCA, clearly states that:

"These rules must be adopted in the interest of public health, public safety, public welfare and protection of property and public resources in regulating swimming, hunting, fishing trapping boating, **including but no limited to** boating speed regulation, the operation of motor driven boats, the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats, waterskiing, surfboarding, picnicking, camping, sanitation and use of firearms on reservoirs, lakes, rivers and streams or at designated areas along the shore of the reservoirs, lakes and streams."

Had the Montana Legislature intended a very narrow use of this statute to apply only to speed limits of motorized boats, the wording "including but not limited to" would have been removed and replaced with constraining language. Clearly the Montana Legislature granted broad authority to FWP to resolve conflicts and did not limit FWP to merely regulation of speed of motorized watercraft.

Included in both the Section 87-1-303 (2), MCA, and in the statement of intent for HB626 is a grant of authority to resolve conflicts between motorized and nonmotorized boats. Clearly this authority applies to conflicts between motorized and nonmotorized users, between two differing types of motorized users and conflicts between two differing nonmotorized boaters. Anything short of these three scenarios would allow for conflict within each of these classes, a loophole the sponsors clearly tried to close with a broad grant of authority.

Governor Racicot examined this very issue in 1999. He recognized FWP's authority to regulate social conflicts contained in HB626 when he vetoed SB445. In his explanation of his veto of SB445 the Governor stated, "Under rulemaking authority given to the Fish, Wildlife and Parks Commission by House Bill 626, which takes effect June 1, 1999, the Commission may adopt rules addressing conflicts on rivers, including the regulation of commercial use based on recreational use of fishing or floating. Given the broader authority granted by House Bill 626, the Commission could establish moratoriums on new commercial use and develop river recreation management plan for the Big Hole and Beaverhead Rivers as well as other state waters when the need arises, and adopt rules implementing those plans." A copy of the Governor's explanation is enclosed.

In the instance of the regulations specific to the Big Hole and Beaverhead Rivers, FWP was faced with a request to regulate floating activity on the two rivers. Specifically, concerns were raised about increasing numbers of outfitter boats using the two rivers, and saturation of specific reaches of river by both outfitters and the general public.

FWP exercised their authority to regulate recreational use of fishing, consistent with the grant of authority in Section 87-1-303, MCA, to limit the number of anglers in a season that may use an outfitter as their method of fishing and introduced a distribution plan to limit overall boat launches within specific areas.

**Issue #2** Did FWP fail to follow rule making procedures contained in Sections 2-4-302 through 2-4-305, MCA?

NO. FWP rulemaking specific to the Big Hole and Beaverhead River Recreation Management Plans qualifies for the exception to the Montana Administrative Procedures Act, contained in Section 2-4-102 (11) (D), MCA. This exception applies to:

"seasonal rules adopted annually or biennially relating to hunting, fishing and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals."

The Big Hole and Beaverhead plans were adopted biennially and relate to seasonal recreational use. The regulations only apply to the period late May to Labor Day each season. The regulations limit the method of recreation on the two rivers. The rules do not implement regulation of the outfitting industry, instead they place limits on the number of anglers that may use an outfitter as their method of angling. Outfitters that use the Big Hole and Beaverhead Rivers are not limited in the total number of client that they may serve in Montana. The only limitation is that a fixed number of anglers may use

an outfitter as their method of angling on the Big Hole and Beaverhead Rivers. Nothing in the rules preclude outfitters from expanded use on any other Montana water, including tributaries to either river.

The Big Hole Watershed Committee believes that FWP has solid statutory authority to regulate social conflict on the Big Hole and Beaverhead Rivers and followed the proper procedure. We believe that it is unnecessary for EQC to review these questions as they have been repeatedly considered and upheld through the development of the Recreation Plans for the Big Hole and Beaverhead Rivers.

Thank you in advance for your consideration of our comments.

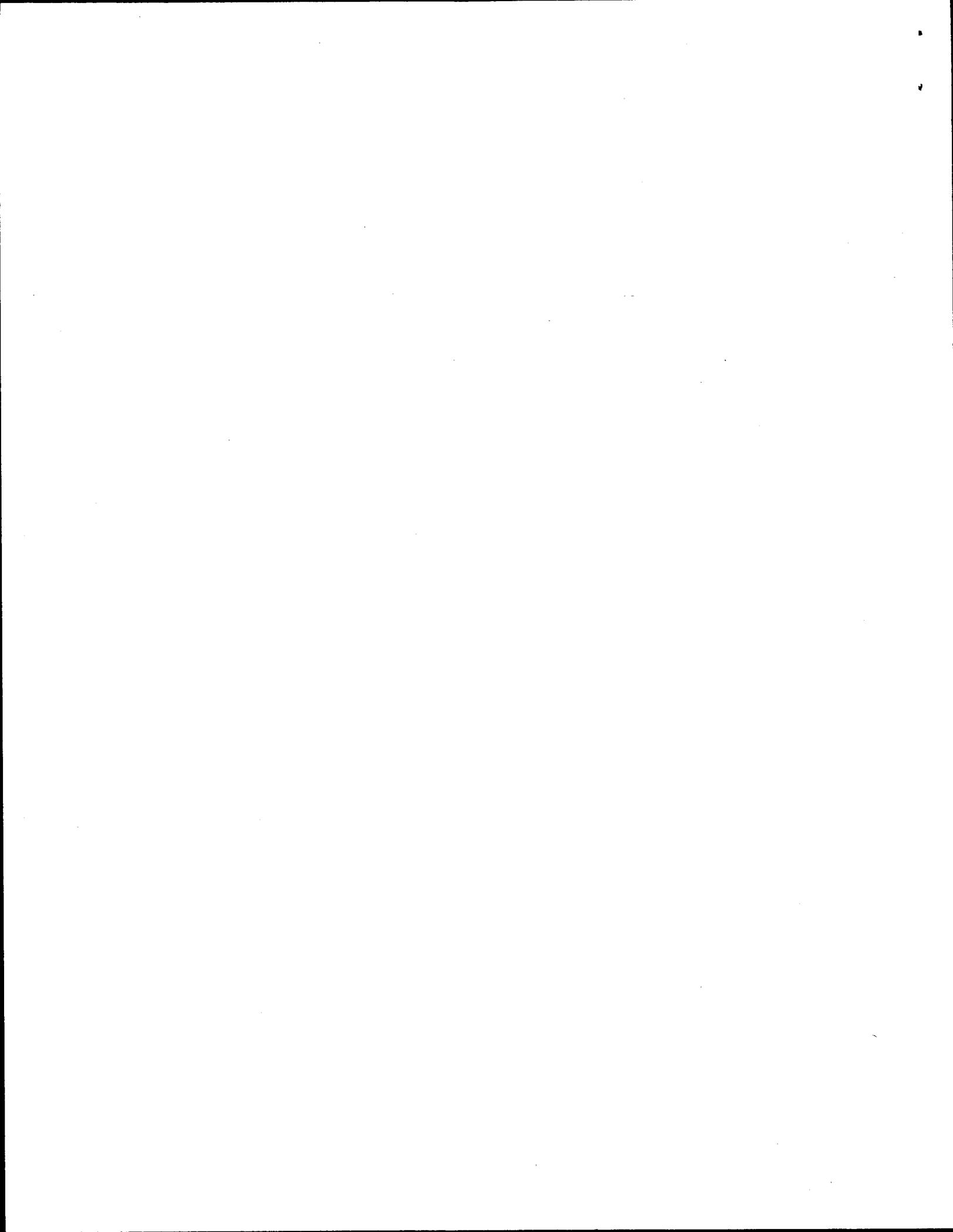
Sincerely,



Randy Smith  
Chairman

Enclosure

CC GOVERNOR MARTZ





**GEORGE GRANT CHAPTER**  
P.O. Box 563  
Butte, Montana 59703

**RECEIVED**

APR 30 2001

**ENVIRONMENTAL  
QUALITY COUNCIL**

April 26, 2001

Senator William Crismore  
Chairman  
Environmental Quality Council  
PO Box 201704  
Helena, MT 59620-1704

Re: HB626 Authority Review

Dear Senator Crismore:

The George Grant Chapter would like to comment on the Fishing Outfitters Association of Montana's (FOAM) request to the Environmental Quality Council for review of the Fish, Wildlife and Parks Commission's (FWP) authority to regulate social conflicts on Montana Waters under HB626.

In a letter dated February 7, 2001 FOAM requested review of the statutory basis and the procedural basis for adoption of regulations to resolve social conflicts. We believe that HB626 gave FWP all the authority necessary to issue regulations resolving crowding and conflict on Montana waters and that FWP followed the proper procedure in implementing the Big Hole and Beaverhead Rivers Recreation Plans.

FOAM contends that HB626 only provides authority to limit speed of motorized craft. This assertion is clearly false. Section 87-1-303 (2), MCA, clearly states that authority is granted to adopt rules "in the interest of public health, public safety, public welfare and protection of property and public resources in regulating swimming, hunting, fishing trapping boating, including but no limited to boating speed regulation, the operation of motor driven boats, the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats, waterskiing, surfboarding, picnicking, camping, sanitation and use of firearms on reservoirs, lakes, rivers and streams or at designated areas along the shore of the reservoirs, lakes and streams."

Clearly the Montana Legislature did not intend a very narrow use of this statute to apply only to speed limits of motorized boats. In fact the statute contains the phrase "including but not limited to" when referring to the authority being granted. Clearly the Montana Legislature granted broad authority to FWP to resolve conflicts and did not limit FWP to merely regulation of speed of motorized watercraft.

HB626 granted authority to resolve conflicts between motorized and nonmotorized boats. This authority applies not just to conflicts between users of motorboats and other individuals recreating in a nonmotorized fashion. A reasonable interpretation of this authority allows for regulations to resolve conflict between two different types of motorized boaters, and between two differing types of nonmotorized boaters. Anything short of these three scenarios would allow for conflict within each of these classes.

Governor Racicot examined FWP's authority, contained in HB626, to regulate social conflicts in 1999, when he vetoed SB445. The Governor recognized the authority to adopt rules to resolve crowding and conflict and stated, "Under rulemaking authority given to the Fish, Wildlife and Parks Commission by House Bill 626, which takes effect June 1, 1999, the Commission may adopt rules addressing conflicts on rivers, including the regulation of commercial use based on recreational use of fishing or floating. Given the broader authority granted by House Bill 626, the Commission could establish moratoriums on new commercial use and develop river recreation management plan for the Big Hole and Beaverhead Rivers as well as other state waters when the need arises, and adopt rules implementing those plans." A copy of the Governor's veto explanation can be obtained from the Montana Secretary of State's Office.

FWP exercised their authority to regulate recreational use of fishing on the Big Hole and Beaverhead Rivers, consistent with the grant of authority in Section 87-1-303, MCA, to limit the number of anglers in a season that may use an outfitter as their method of fishing and introduced a distribution plan to limit overall boat launches within specific areas.

One final important fact that must be brought to your attention is that FOAM also recognized the authority of FWP to regulate social conflicts. The Executive Director of FOAM was appointed by FWP to the Citizen's Advisory Committee advising FWP for both the Big Hole and Beaverhead Rivers. FOAM accepted this seat at the table and their responsibility to represent outfitting interests, and worked within the consensus process built upon HB626, with the express purpose of using HB626 authority to resolve conflict on these two rivers. FOAM participated for over one year, before abruptly withdrawing, and announcing their intent to challenge FWP's authority. FOAM's one-year commitment to the Citizen's Advisory Committee should demonstrate that even this FOAM believed FWP had all the necessary authority to address social conflicts, or they would not have committed one year of staff time to the process.

Secondly, FOAM contends FWP failed to follow rule-making procedures contained in Sections 2-4-302 through 2-4-305, MCA.

Again, FOAM is incorrect. FWP properly followed the exception to the Montana Administrative Procedures Act, contained in Section 2-4-102 (11) (D), MCA, in adopting the Big Hole and Beaverhead Rivers Plans. This exception applies to "seasonal rules adopted annually or biennially relating to hunting, fishing and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals."

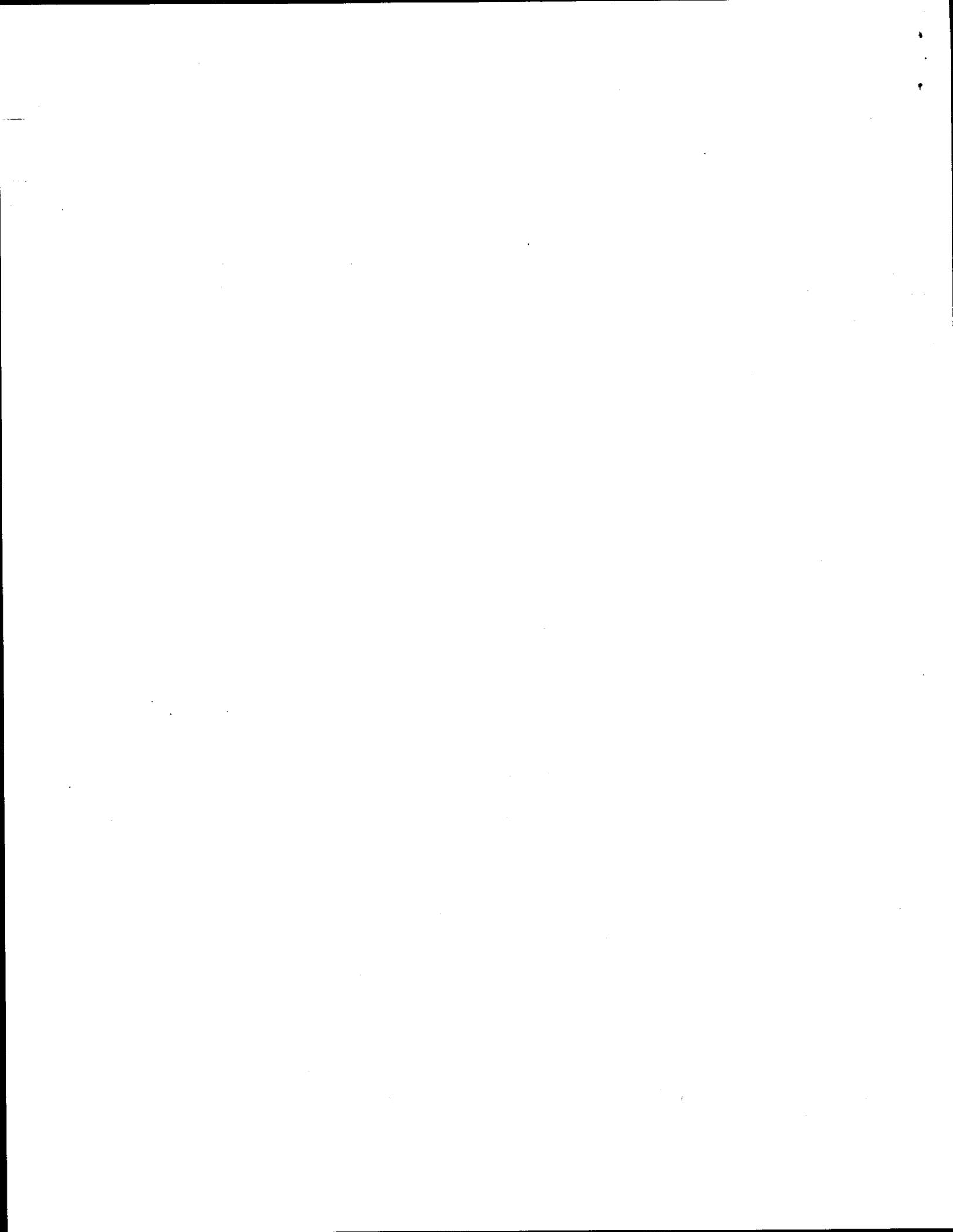
The Big Hole and Beaverhead plans were implemented as biennial rules for seasonal recreational use. The rules do not implement regulation of the outfitting industry, instead they place limits on the number of anglers that may use an outfitter as their method of angling. Outfitters that use the Big Hole and Beaverhead Rivers are not limited in the total number of clients that they may serve in Montana. The only limitation is that a fixed number of anglers may use an outfitter as their method of angling on the Big Hole and Beaverhead Rivers. Nothing in the rules precludes outfitters from expanded use on any other Montana water.

The George Grant Chapter believes HB626 did grant FWP broad authority to regulate social conflict on Montana Waters and FWP followed the proper procedure in implementing the Big Hole and Beaverhead Rivers Plans.

Sincerely,



Byron Mazurek  
President



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May 3, 2001

TO: EQC

FROM: Greg Petesch *GP*

RE: Authority for Beaverhead River and Big Hole River Management Rules

The purpose of this memorandum is to analyze the statutory authority for the Fish, Wildlife, and Parks Commission (Commission) to adopt a replacement River Management Biennial Rule for the Big Hole River and Beaverhead River and to adopt a Commission policy on the Development of Management Plans and Regulations to Address Recreational Conflicts on Rivers. The proposed River Management Biennial Rule restricts operation on the rivers by closing portions of the rivers to float outfitting and limiting each float outfitter's daily launches near official access sites. Between the third Saturday in May and Labor Day, each Saturday is designated as a noncommercial resident's day on specified stretches of the rivers.

Pursuant to sections 2-4-402 and 75-1-324(10), MCA, the Environmental Quality Council has administrative rule review responsibility for the Department of Fish, Wildlife, and Parks. The issue under consideration is whether the Commission has the statutory authority to adopt a River Management Biennial Rule for the Big Hole River and Beaverhead River and if the Commission is required to follow the procedure contained in the Montana Administrative Procedure Act, Title 2, chapter 4, part 3, MCA, in adopting the River Management Biennial Rule.

The authority relied upon by the Commission for the River Management Biennial Rule is contained in section 87-1-303, MCA. That section provides:

**87-1-303. Rules for use of lands and waters.** (1) The commission may adopt and enforce rules governing uses of lands that are acquired or held under easement

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by the commission or lands that it operates under agreement with or in conjunction with a federal or state agency or private owner. The rules must be adopted in the interest of public health, public safety, and protection of property in regulating the use of these lands. All lease and easement agreements must itemize uses as listed in 87-1-209.

(2) The commission may adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and lakes that it operates under agreement with or in conjunction with a federal or state agency or private owner. These rules must be adopted in the interest of public health, public safety, public welfare, and protection of property and public resources in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor-driven boats, the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats, waterskiing, surfboarding, picnicking, camping, sanitation, and use of firearms on the reservoirs, lakes, rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers, and streams. Areas regulated pursuant to the authority contained in this section must be areas that are legally accessible to the public. These rules are subject to review and approval by the department of public health and human services with regard to issues of public health and sanitation before becoming effective. Copies of the rules must show that endorsement.

In analyzing the River Management Biennial Rule in light of section 87-1-303, MCA, I will apply the rules of statutory construction. The rules of statutory construction require the language of a statute to be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is required. A person construing a statute should resort to legislative history only if legislative intent cannot be determined from the plain wording of the statute. Lovell v. State Compensation Mutual Insurance Fund, 260 Mont. 279, 860 P.2d 95 (1993). See also State v. Zabawa, 279 Mont. 307, 928 P.2d 151 (1996). In construing a statute, the court must find legislative intent from the plain meaning by reasonably and logically interpreting the statute as a whole without omitting or inserting anything or determining intent from a reading of only a part of the statute. Gaub v. Milbank Insurance Co., 220 Mont. 424, 715 P.2d 443 (1986). A statute will not be interpreted to defeat its object or purpose, and the object sought to be achieved by the Legislature is of prime consideration in interpreting it. Dover Ranch v. Yellowstone County, 187 Mont. 276, 609 P.2d 711 (1980). While a statute may have some ambiguities due to a large variety of possible situations that are covered by a statute, a court is not required under due process standards to find vagueness in the terms used in a statute so as to destroy an act; rather, it is the court's duty to construe a statute so as to be consistent with the will of the Legislature and to comport with constitutional limitations. In re Montana Pacific Oil & Gas Co., 189 Mont. 11, 614 P.2d 1045 (1980), citing CSC v. Letter Carriers, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973). In determining the meaning of a statute, deference must be

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given to the interpretations given the statute by the officers and agencies charged with its administration. State v. Midland Materials Co., 204 Mont. 65, 662 P.2d 1322 (1983). A reasonable construction of a statute must be adopted if possible. Great deference must be shown to the interpretation given the statute by the officers or agency charged with its administration. Although the intent of the Legislature must first be determined from the plain meaning of the words used, a court can resort to the history of the statute. Department of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 587 P.2d 1282 (1978).

With these principles in mind, I will analyze the language of section 87-1-303(2), MCA. Section 87-1-303(2), MCA, specifically grants the Commission the authority to adopt and enforce rules governing the recreational use of all public rivers that are legally accessible to the public. The rules are required to be adopted in the interest of public health, public safety, public welfare, and the protection of property and public resources in regulating fishing and boating on rivers or at designated areas along the shore of the rivers. The areas regulated must be legally accessible to the public.

In Montana Coalition for Stream Access, Inc. v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984), the Montana Supreme Court specifically held that the public had the right to use the bed and banks of the Beaverhead River up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water. In Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), the Montana Supreme Court held that the capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Under these holdings, the Beaverhead River and Big Hole River are legally accessible to the public.

Recreational use is not defined for the purposes of section 87-1-303(2), MCA. In Curran, the Montana Supreme Court held that the Montana Constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State and that any surface waters that are capable of recreational use may be used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. In response to Hildreth and Curran, the Legislature enacted Title 23, chapter 2, part 3, MCA. Section 23-2-302, MCA, allows the public to make recreational use of natural water bodies. For the purposes of Title 23, chapter 2, part 3, MCA, recreational use means fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft, unless otherwise prohibited or in regulated by law, or in craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

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Section 23-2-302(5), MCA, provides that the Commission shall adopt rules governing the recreational use of surface waters pursuant to section 87-1-303, MCA, in the interest of public health, public safety, or the protection of public and private property. The rules are required to include the establishment of procedures by which any person may request an order from the Commission: (1) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water; or (2) altering limitations, restrictions, or prohibitions on recreational use of a surface water imposed by the Commission. The rules are also required to include provisions requiring the issuance of written findings and a decision whenever a request is made pursuant to the rules. Pursuant to section 23-2-302(5), MCA, which requires that rules be adopted pursuant to section 87-1-303, MCA, the definition of "recreational use" which is contained in section 23-2-301, MCA, applies to section 87-1-303, MCA.

The language in section 87-1-303(2), MCA, requiring the rules to be adopted in the interest of public health, public safety, and public welfare invokes the police power. State and local governments have inherent power to enact reasonable legislation for the health, safety, welfare, or morals of the public, even though the legislation is an infringement of individual rights. Police power regulations are presumed reasonable, and a clear showing is required for a finding that they are unreasonable. State v. Deitchler, 201 Mont. 70, 651 P.2d 1020 (1982). A police power regulation must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. The standard of reasonableness is the constitutional measure of the proper exercise of the police power. As a general rule, acts conducted in the proper exercise of police power do not constitute a taking of property and do not entitle the owner of property to compensation for the regulation or impairment of the use of the property except in cases that exceed regulation or impairment and that entail an appropriation of property that amounts to a taking or deprivation of property for public use. Yellowstone Valley Electric Cooperative v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980).

In light of this analysis, the plain meaning of section 87-1-303(2), MCA, is that the Commission has explicit authority to limit, restrict, or prohibit fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft, unless otherwise prohibited or regulated by law, or in craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses on the Beaverhead and Big Hole Rivers. The troubling aspect of this broad authority is that it is not clear that the Commission could adopt the proposed River Management Biennial Rule under the Commission's implementation of the directive contained in section 23-2-302(5), MCA. Under ARM 12.4.101 through 12.4.106, in order to invoke the Commission's authority to limit recreational use, a petitioner is required to allege that the recreational use of a river is damaging the banks and land adjacent to the river, is damaging the property of the adjacent landowner, is adversely affecting fish or wildlife, is disrupting or altering natural areas or biotic communities, or is causing degradation of the water

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body. The asserted reasons for the Commission's proposed River Management Biennial Rule are increased user conflicts, resource and property damage concerns, demands upon limited public facilities, and concerns over the quality of the recreational experience. I am unable to determine why the Commission would hold a citizen to a higher standard to petition for a restriction on recreational use than the Commission imposes upon itself.

In addition to the issue of whether the Commission has the authority to adopt the River Management Biennial Rule, there is a question as to whether the proper procedure was followed in adopting the rule. Title 2, chapter 4, part 3, MCA, provides the procedure that must be followed by an Executive Branch agency in order to adopt a valid rule. Generally, in order for an administrative rule to be valid, an agency must provide notice of its intended action, provide for the opportunity for a hearing and comment on the intended action, and respond to comments received. In addition, there must be a clear delegation of authority from the Legislature to the agency for the adoption of the rule and the rule must implement a statute. Section 2-4-102, MCA, defines a rule as each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. "Rule" does not include rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals.

The proposed River Management Biennial Rule is specifically designated as a biennial rule relating to the period between May 2, 2001, and May 1, 2003, and applies to the recreational use of water controlled by the state. Because the River Management Biennial Rule would only apply during fishing season, the proposed rule appears to meet the requirement that it be "seasonal". If the substance of the rule is indicated to the public by means of signs, then the proposed River Management Biennial Rule is not required to be adopted pursuant to the procedure provided in Title 2, chapter 4, part 3, MCA, because the River Management Biennial Rule falls within the exception to the definition of a "rule" for purposes of the Montana Administrative Procedure Act.

In conclusion, my analysis indicates that the Commission has the authority to adopt the River Management Biennial Rule pursuant to the authority granted by the Legislature in section 87-1-303(2), MCA. If the substance of the rule is indicated to the public by means of signs, the River Management Biennial Rule falls within the exception to the definition of a "rule" for purposes of the Montana Administrative Procedure Act and thus is not required to be adopted pursuant to the procedure provided in Title 2, chapter 4, part 3, MCA. Therefore, the Environmental Quality Council does not have authority to review the River Management Biennial Rule pursuant to Title 2, chapter 4, part 4, MCA. Any action that the Environmental Quality Council chooses to take with regard to the proposed River Management Biennial Rule would have to be taken pursuant to the program evaluation and monitoring functions delegated to the Council pursuant to section 75-1-324(10)(b), MCA.

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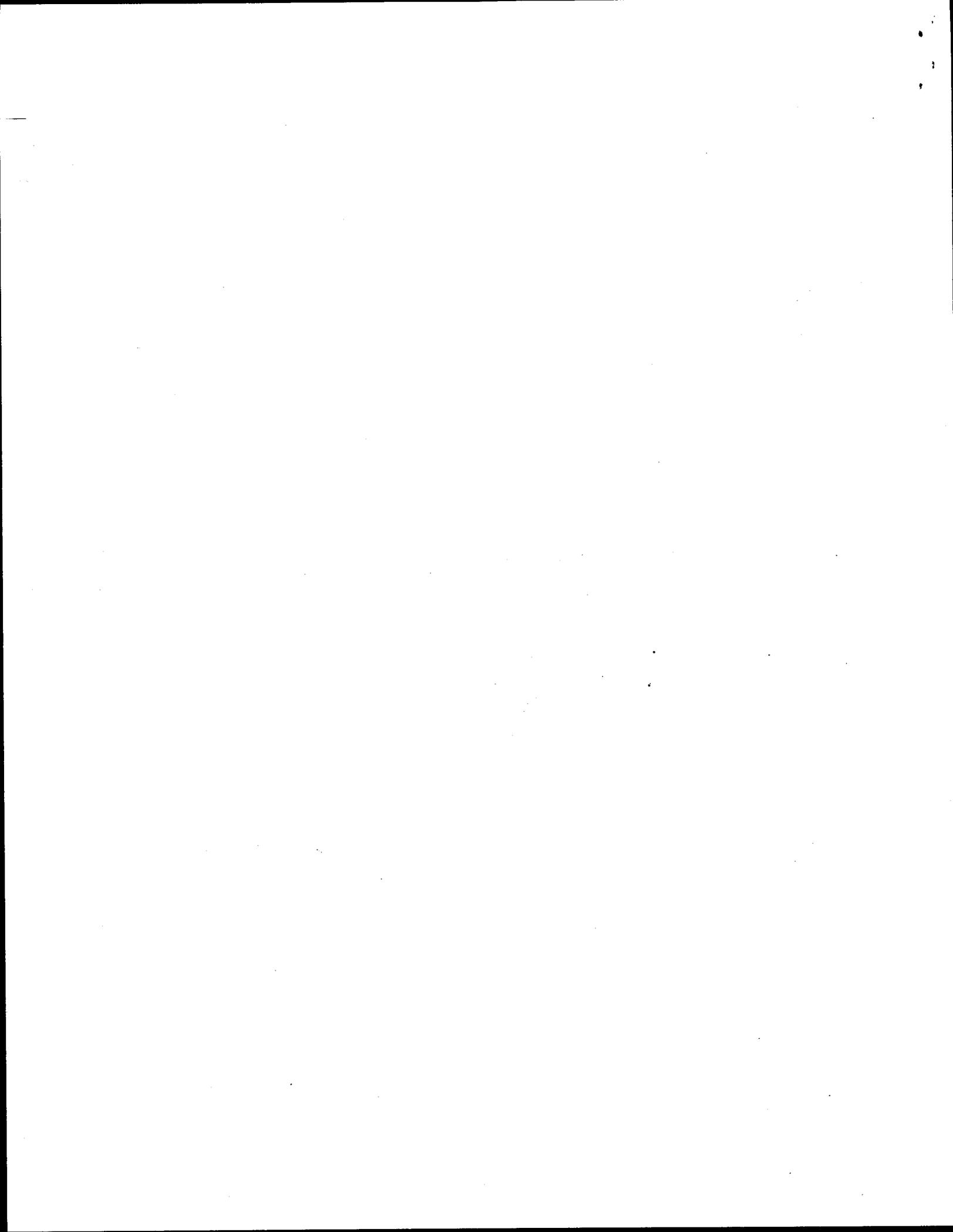




EXHIBIT #9

*Montana Fish,  
Wildlife & Parks*

MEMORADUM

**TO:** Environmental Quality Council  
**FROM:** Bob Lane and Martha Williams *Bob Lane Martha Williams*  
**DATE:** April 18, 2001  
**RE:** Beaverhead and Big Hole Rulemaking

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On February 7, 2001, Thomas Anacker, on behalf of the Fishing Outfitters Association of Montana (FOAM), requested that the Environmental Quality Council (EQC) review and issue an objection to the Fish, Wildlife and Parks Commission (Commission) rules regarding river recreation use of the Beaverhead and Big Hole rivers and policy regarding development of river recreation plans. Specifically, Mr. Anacker raised two issues in support of his request: 1) whether the Commission was required to follow the Montana Administrative Procedure Act (MAPA) in adopting the rules and policy in question; and 2) whether the Commission had the authority to adopt the rules and policy in question. Subsequently, Governor Martz encouraged the EQC to review the legal arguments presented by Mr. Anacker and to render a decision on the Commission's authority to adopt the rules and policy in question.

Section 2-4-402, MCA, states that the appropriate administrative rule review committee may prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule. As the appropriate administrative rule review committee in this instance, EQC's

role is advisory in nature. However, if EQC were to object to the Commission's rules or policy, its objection would shift the burden of proof to the Commission to show that the rules or policy were adopted in substantial compliance with MAPA's procedural requirements. See § 2-4-406(4), MCA. Further, for an administrative rule to be valid, it must be reasonably necessary to effectuate the purposes of the underlying statute. § 2-4-305, MCA; see also *Bick v. State Dep't of Justice*, 730 P.2d 418, 224 Mont. 455, 458 (1986)(citing *Norfolk Holdings v. Montana Dep't of Revenue*, 813 P.2d 460, 249 Mont. 40 (1991))(giving great deference to an interpretation given a statute by agency charged with its administration).

To aid the EQC in preparation of its recommendation and in response to Mr. Anacker's request, the Department submits this Memorandum. This Memorandum sets forth the history of the rules governing recreational use of the Beaverhead and Big Hole rivers and of the policy governing the development of river recreation plans, explains why the rules and policy complied with the MAPA, and explains why the Commission had the authority to adopt the rules and policy. Additionally, the attachments to this Memorandum provide documentation of the ongoing development of the rules and the policy.

#### **I. Background of Beaverhead/Big Hole Rules**

During the 1999 Legislative Session, Senator Swysgood from Dillon sponsored Senate Bill 445 that addressed conflicts in use on the Beaverhead and Big Hole rivers. As originally drafted, SB 445 would have required outfitters to obtain a boat tag before operating on rivers of the state, placed a moratorium on use of the Beaverhead and Big

Hole rivers, and required that a recreation resource management plan be developed for the two rivers.

On the last day of the 1999 Legislative Session, SB 445 passed both houses, but was amended substantially. See Attachment 1. With the last minute amendments, SB 445 had some technical problems, raised constitutional questions, and contained some vague provisions. For these reasons, Governor Racicot vetoed SB 445. Nonetheless, the Governor's Office recognized public concern for use of the Beaverhead and Big Hole rivers, the need for a process to address those concerns, and the public expectation that some form of moratorium on use on the Beaverhead and Big Hole rivers be put in place.

In his veto letter, Governor Racicot stated that as "a possible solution to the problems believed to exist on the Beaverhead and Big Hole rivers, and to other state waters as well, with respect to the apparent rapid increase in floating use and the possibility that certain rivers could become overrun by outfitters trying to establish historic use before any plan could be completed," he urged the Commission to "undertake a rulemaking effort patterned after Senate Bill 445, to create a moratorium on new commercial use by adopting without delay short-term rules in reference to the Big Hole and Beaverhead rivers." See Attachment 2. In support of this recommendation, Governor Racicot stated that House Bill 626 (codified in § 87-1-303, MCA) gave the Commission the authority to adopt rules addressing conflicts on rivers, "including the regulation of commercial use based on recreational use of fishing or floating." Further, the Governor noted that "[g]iven the broader authority granted by House Bill 626, the Commission could establish moratoriums on new commercial use and develop river recreation management plans for the Big Hole and Beaverhead rivers as well as other state waters

when the need arises, and adopt rules implementing those plans. . . . In this way, the problems could be addressed relatively soon and would not have to await consideration by the 2001 Legislature.”

The Commission interpreted Governor’s Racicot’s veto letter as direction to put rules in place to prevent outfitters increasing their use of the rivers in an attempt to establish historical use before a moratorium could be put in place and to work with interested persons to develop comprehensive plans addressing social conflicts on these rivers. Thus with this direction, on June 29, 1999, the Commission adopted an interim biennial rule on use of these two rivers. See Attachment 3. Also as Governor Racicot directed, the Commission mirrored its interim biennial rule after SB 445, but ostensibly without the technical and constitutional problems. Attachment 5 outlines the process the Commission followed in adopting the 1999 rule. This interim biennial rule put a simple moratorium in place until the Commission adopted recreation management plans and implementing rules for the Beaverhead and Big Hole rivers. The rule also directed the Department to facilitate interested parties from throughout the state to participate in a public process to address conflicts on the Beaverhead and Big Hole rivers. The Commission amended the interim biennial rule on January 12, 2000, to address concerns from outfitters. The interim biennial rule is effective through May 1, 2001.

The Commission also followed a complete and lengthy public involvement process in adopting the June 15, 2000, policy that was intended to provide guidelines for the development of river recreation plans. See Attachment 4. This policy laid out the sideboards for the development of plans; it did not dictate the contents of the plans. Concurrently, the Department facilitated a planning process to address use conflicts

specific to the Beaverhead and Big Hole rivers. The Department contracted with the Montana Consensus Council to design a public agreement-building process and write the management plans and with two individuals to facilitate the advisory committees. The advisory committees included individuals representing the interests affected by the river management plans. The groups met at least monthly with meetings occurring more often as October 2000 drew near. Notice of the committee meetings was published in the local paper and a time period for public comment was set aside in each meeting. From October of 1999 through October of 2000 committee members spent numerous hours identifying problems, evaluating data, discussing alternatives, listening to public comment, and designing strategies to solve the identified problems on the Beaverhead and Big Hole rivers. These strategies became the draft management plans.

The Commission reviewed all the information and recommendations pulled together in the draft management plans. As the decisionmaker in adopting management plans and any rules regulating use of the Beaverhead and Big Hole rivers, the Commission did not want to adopt the management plans without following the sideboards set out in its policy guiding the development of river recreation plans and without independently analyzing the plans and subsequent rule. See § 2-15-102, MCA (defining "advisory capacity"). Therefore, the Commission presented the plans to the public and solicited comments. After reviewing the public input, the Commission was concerned that the management plans did not follow the sideboards set out in its policy guiding the development of river recreation plans. For example, the Commission was concerned that the permitting proposals in the plans would create property rights for outfitters on the rivers, which are a public resource. Moreover, because this type of river

regulation had not been adopted in Montana before, the Commission was concerned about making the regulation longer term than two years. The Commission wanted to prevent unforeseen negative consequences to business, recreators, and the resource. In summary, the Commission viewed the rulemaking and the management plans as a work in progress. The Commission adopted a second biennial rule on February 2, 2001 and determined that the 2001 biennial rule was needed to protect the resources until a complete, tested regulation could be created. Attachment 7. Therefore, the Commission decided that a biennial rule would be the most appropriate vehicle to use in regulating river conflicts on the Beaverhead and Big Hole rivers while additional information was gathered and more practical experience was gained in regulating the rivers.

## **II. Authority for Beaverhead/Big Hole Rules**

### **A. MAPA and Rulemaking**

#### **i. MAPA Prescribes Three Types of Rules**

The MAPA, Title 2, Chapter 4 of Montana Code Annotated, governs executive agencies' adoption and publication of administrative rules. It further provides for legislative and judicial review of administrative rules. Under § 2-3-102, MCA, and § 2-4-102, MCA, the Fish, Wildlife and Parks Commission is an agency that falls under the purview of MAPA. MAPA defines "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy....," § 2-4-102 (11), MCA.

Under MAPA, the Commission has three types of rules that it may promulgate: administrative rules, emergency rules, and annual or biennial rules. Part 3 of MAPA delineates a formal rulemaking process for administrative rules. See also §§ 1.3.201 –

1.3.233, ARM. Administrative rules are long-term rules that are in effect until amended or repealed. Additionally, MAPA sets forth a strict schedule for adopting administrative rules, including publication of a notice of adoption with the Secretary of State, and requiring notice and adoption of a rule within 6 months. See § 2-4-305, MCA.

Section 2-4-303, MCA, governs the adoption of emergency rules. These rules require an agency to find that "imminent peril to the public health, safety, or welfare requires adoption of a rule with fewer than 30 days notice. Further, an emergency rule may be in effect for no more than 120 days. See also 1.3.209, ARM.

MAPA also provides for the adoption of annual or biennial rules. However, these rules do not fall within the strict requirements of administrative rules because MAPA's definition of "rule" excludes them. The term "rule" does not include:

seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands or waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; § 2-4-102 (11)(d), MCA.

The Commission regularly promulgates biennial rules to fulfill its broad statutory authority to establish the hunting, fishing, and trapping rules of the Department. See § 87-1-301, MCA.

Of the three types of rules that the Commission could promulgate, administrative rule, emergency rule, or annual or biennial rule, the biennial rule is best suited to address conflicts in use on the Beaverhead and Big Hole rivers. The Commission was faced with a situation where it needed to adopt a rule for a temporary period, but longer than 120 days, and allow the interested parties to develop river recreation management plans for

longer-term solutions. A biennial rule adopted to regulate seasonal recreational use could do just that.

**ii. Annual/Biennial Rule Exemption from MAPA**

To meet the exemption from MAPA's formal rulemaking process, a biennial rule must relate to seasonal recreational use. The biennial rules adopted by the Commission in 1999 and 2001 regulate seasonal recreational uses of the Beaverhead and Big Hole rivers. Both the Beaverhead and Big Hole advisory groups found fishing to be the primary recreational use on the rivers but also recognized that the rivers support other uses such as recreational boating, swimming, hunting and trapping, and picnicking. See Draft Big Hole River Recreation Management Plan, p.12 and Draft Beaverhead River Recreation Management Plan, p.10. Both advisory groups also identified conflicts among types of recreational use and increased use diminishing the quality of experience of fishing as problems that needed to be addressed. See Draft Big Hole River Recreation Management Plan, problem statements, p.14 and Draft Beaverhead River Recreation Management Plan, problem statements, p.15. The rules governing recreational use of the Beaverhead and Big Hole rivers have been published as an addendum to the Department's 2000-2001 fishing regulations and will be published with the 2002-2003 fishing regulations.

To address the problems identified in SB 445 and by the advisory groups, the 1999 and 2001 rules and the policy primarily regulate fishing, which is a recreational sport. The profession of outfitting on the Beaverhead and Big Hole rivers stems from the recreational uses of fishing and boating. See *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978). In *Baldwin*, the United States Supreme Court held that hunting is recreation and a sport and not a means to a livelihood. *Baldwin*, 436 U.S.

at 376. Moreover, the “analogous legal treatment of rivers and wild animals has been described as complete from the days of the Roman law to our own time.” Samuel C. Weil, *Running Water*, 22 HARV. L. REV. 190, 213 (1909). The United States Supreme Court has recognized on numerous occasions, the legitimate state concern for conservation and protection of wild animals. This police power to preserve and regulate the exploitation of an important resource must conform to federal laws and the Constitution. *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979). See also *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924) and *State v. Jack*, 167 Mont. 456, 539 P.2d 726 (1975) (recognizing the police power to protect fish and wildlife).

The same tenets of law that supported the United States Supreme Court’s decision in *Baldwin* apply to fishing and boating on the Beaverhead and Big Hole rivers. Fishing and boating on the state’s waters such as the Beaverhead and Big Hole rivers are recreation and sport. Moreover, neither the 1999 nor the 2001 biennial rule regulates anything but recreational uses. For example, commercial fishing, or the catching of fish for use in commerce is not at issue. Instead, the rules regulate the sport of fishing, and the subsequent ability to commercially guide residents and nonresidents wishing to use State waters for the recreational use of fishing or boating.

In addition to regulating recreational use, the rules are seasonal in nature. They address the use of the rivers during the summer months of peak use by regulating when and where fishing and boating may occur. For example, some of the restrictions on recreational use that the 2001 biennial rule imposes are only seasonal - from the third Saturday in May through Labor Day. Moreover, the Beaverhead River is closed to fishing for part of the year. Uses of both rivers occur seasonally because the rivers change

throughout the year. The fishing and recreation experience is varied based on conditions from less use during cold weather and no floating to peak use during the salmon fly hatch. Any rule regulating use varies by season because the use of the rivers varies by season.

### **iii. Public Involvement**

Importantly, in adopting the biennial rules, the Commission provided for substantial public involvement in the rulemaking process. In fact, its adoption of the 1999 and 2001 rules exceeded most of MAPA's administrative rulemaking requirements. See Attachments 5 and 8. For example, for both the 1999 and 2001 rules, the Commission held more public hearings than required for administrative rules, and allowed for longer comment periods than for administrative rules. The Commission gave shorter notice of hearings and public meetings than required for administrative rules, but always gave notice of the hearings and public meetings. The attached timelines (Attachments 5 and 8) show that the Commission sought extensive public input in the development of the rules and policy. Moreover, the Commission followed administrative rule guidelines for decisions of significant interest. See ARM 1.3.102. Section 1.3.102, ARM, states that in accordance with the notice and opportunity to be heard provisions, "prior to making a final decision that is of significant interest to the public, the agency shall afford reasonable opportunity for public participation."

Public participation may be afforded by a number of ways. Section 2-3-104, MCA, states that one way public participation may be afforded is to provide a public hearing, give notice of the hearing, and permit public comment on the matter. Another way to afford public participation is to provide for a hearing and sufficiently prior to the

final decision on the matter have a newspaper of general circulation within the area to be affected by the decision carry a news story or advertisement concerning the decision, and to permit public comment on the matter. § 2-3-104(3) and (4), MCA. Prior to making its final decision on the 1999 and 2001 rules, the Dillon Tribune and Helena Independent Record ran stories on the Commission's upcoming decision and the Department sent press releases to the papers affording public comment before the Commission made its decisions. The Commission clearly afforded reasonable opportunity for public comment by holding numerous hearings and publishing numerous stories and press releases regarding the proposed rules and policy. The amount of comment received by the Commission demonstrates active participation by interested persons.

#### **B. Big Hole and Beaverhead Rules as Biennial Rules**

The biennial rules on regulation and distribution of river recreation use for the Beaverhead and Big Hole rivers state the legal authority for the rules. They provide that § 87-1-303, MCA, gives the Commission the authority to adopt and enforce rules governing recreational uses of waters for public health, public safety, and protection of property. Additionally, § 87-1-303, MCA, gives the Commission the authority to adopt and enforce rules governing recreational uses of waters in the interest of public welfare and protection of public resources.

##### **i. Rules of Statutory Construction**

To determine whether or not § 87-1-103, MCA, gives the Commission the specific authority to adopt its rules regulating seasonal recreational use of the Beaverhead and Big Hole rivers, the rules of statutory construction govern. Section 1-2-102, MCA, states that in the construction of a statute, the intention of the legislature is to be pursued

if possible. Thus, when a statute is plain and unambiguous on its face, it must be applied as written. *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 119, 929 P.2d 222, 225 (1996). The Montana Supreme Court has interpreted § 1-2-102, MCA, to mean that where the intention of the legislature can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply other means of interpretation. *Clarke*, 897 P.2d at 1088 (citing *Tongue River Elec. Coop. v. Montana Power Co.*, 195 Mont. 511, 515, 636 P.2d 862, 864(1981)); *Bradley v. North Country Auto and Marine*, 299 Mont. 157, 999 P.2d 308 (2000); *Dorn v. Board of Trustees of Billings School Dist. No. 2*, 203 Mont. 136, 144, 661 P.2d 426, 430 (1983). The Court will resort to legislative history only if the intent cannot be determined from the plain wording of the statute. *Clarke*, 897 P.2d at 1088.

Section 87-1-303(2), MCA, provides:

The Commission may adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and lakes that it operates under agreement with or in conjunction with a federal or state agency or private owner. These rules must be adopted in the interest of public health, public safety, public welfare, and protection of property and public resources in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor-driven boats, the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats, waterskiing, surfboarding, picnicking, camping, sanitation, and use of firearms on the reservoirs, lakes, rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers, and streams. Areas regulated pursuant to the authority contained in this section must be areas that are legally accessible to the public. These rules are subject to review and approval by the department of public health and human services with regard to issues of public health and sanitation before becoming effective. Copies of the rules must show that endorsement. (emphasis added)

The plain meaning of the words used in § 87-1-303, MCA demonstrate a clear and broad legislative intent. The first sentence of § 87-1-303, MCA, states that the

Commission is given the authority to “adopt and enforce rules governing recreational use” of all public waters. The second sentence gives the criteria under which the rules may be adopted: “in the interest of public health, public safety, public welfare and protection of property and public resources.” In addition, the authority to govern recreational use of public waters applies to “swimming, hunting, fishing, trapping, boating, including but not limited to....” The statute provides a nonexclusive list of examples of what may be regulated in the protection of property and public resources. In fact, the plain language of the statute provides that these examples are not exclusive. As Governor Racicot noted in a letter to Chris Wester dated July 17, 2000, “The “swimming, hunting, fishing, boating” language covers almost any type of regulation on a river meeting the criteria of “public health, public safety, public welfare...” that the Commission determines is necessary. This would include commercial float trips and outfitter fishing trips. The authority is not limited to just conflict between “motorized and nonmotorized users.” See Attachment 6.

#### **ii. State’s Broad Police Power to Regulate Public Welfare**

The State’s police power to address public peace, public safety, public health, and the public welfare are broad and far reaching. Extensive case law elucidates the extent to which the police powers may reach. See, for example where public welfare includes a myriad of zoning issues (*Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St. 3d 28, 505 N.E.2d 966)(upholding zoning regulation because it is in the interest of the public’s welfare to maintain the aesthetics of a community); (*City of Akron Housing Appeals Board v. Zindle* (Ohio 2000), 2000 Ohio App. LEXIS 22881) (upholding city code as protecting public health, safety, and welfare by requiring upkeep of buildings

such as downspouts be kept in good repair and every window and door, and basement hatchway be weathertight and waterproof....); (*Fremont Lumber Co. v. Energy Facility Siting Council* (Ore. 2001), 331 Ore. 566, 16 P.3d 1147) (upholding regulation of treatment, storage, and disposal of wastes); (see also *U.S. v. Ellison* (D.Ct. Co 2000), 112 F.Supp. 2d 1234 (upholding the conviction of fishing outfitter of a public welfare offense for violating the terms and conditions of a special use permit, contract, and approved operating plan for guiding a client on a river that was not approved). The legislature may delegate its police power to an executive agency by statute. Further, an executive agency may implement the state's police power through a number of types of rules. See *Norfolk Holdings v. Montana Dep't of Revenue*, 813 P.2d 460, 249 Mont. 40 (1991))(giving great deference to an interpretation given a statute by agency charged with its administration).

In 1935, the Montana Supreme Court recognized that the state's police power extends to public welfare. *State ex. rel. Freeman v. Abstracters Board of Examiners* (1935) 99 Mont. 564, 45 P.2d 668. In *Freeman*, the Court explained that the police power of the state extends to public welfare "by reason of the increasing complexity and conflict of modern and social economic tendencies." 99 Mont. at 565. Importantly, the Court explained how public welfare is of a different nature than public health and safety. Public welfare goes to the general well being of the people and conflicts that arise in society.

The Montana Supreme Court has equated the authority of the state to regulate for the public welfare with the authority to regulate for the general welfare of the people. *Freeman*, 99 Mont. at 580; *Associated Merchants v. Ormesher*, 107 Mont. 530, 86 P. 1031 (1939); see also *State ex rel Westlake et al v. District Court*, 118 Mont. 414, 167

P.2d 588 (1946). For example, the Court analogized public welfare to public convenience or general prosperity. *Westlake*, 118 Mont. at 414. In support of the broad reach of the police power to regulate for public welfare, the Court has stated that public welfare “embraces regulation designed to promote public convenience and the peace and good order of society” and thus may be exercised in what a preponderance of opinion deems necessary to the public welfare. *State v. Loomis*, 75 Mont. 88, 242 P. 344 (1925).

In *In re Dearborn Drainage Area*, 240 Mont. 39, 782 P.2d 898 (1989), the Montana Supreme Court held that regarding the adjudication of the appropriation of water, the Department has been charged with the duty of representing the public’s interests in regards to recreational use of Montana Waters. “The duty is concomitant with Article IX, Section 3, Part 3 of the Montana Constitution which states: ‘All... waters within the boundaries of the state are the property of the state for use of its people...’

In the context of the authority conferred to the Commission by statute, the criteria of public welfare and protection of public resources includes commercial use based on recreational use of fishing and floating. Therefore, in the interest of public welfare and protection of property and public resources, the Commission invoked its authority to adopt and enforce rules governing recreational use of public rivers by regulating fishing and boating on the Beaverhead and Big Hole rivers. They regulate who may fish in the rivers and at what times of the week and year. The Commission adopted these rules in the interest of decreasing river conflicts, decreasing resource and property damage concerns, and demands on the limited public facilities and natural resources, all issues of general welfare to the people of Montana. Therefore, the Commission adopted the rules in the

interest of protecting property and the public resource of the rivers, and the public welfare.

### **III. Attachments**

**Attachment 1 - SB 445 – reference bill as amended**

**Attachment 2 - Veto letter**

**Attachment 3 - Interim Biennial Rule adopted June 29, 1999**

**Attachment 4 - June 15, 2000 River Conflicts Policy**

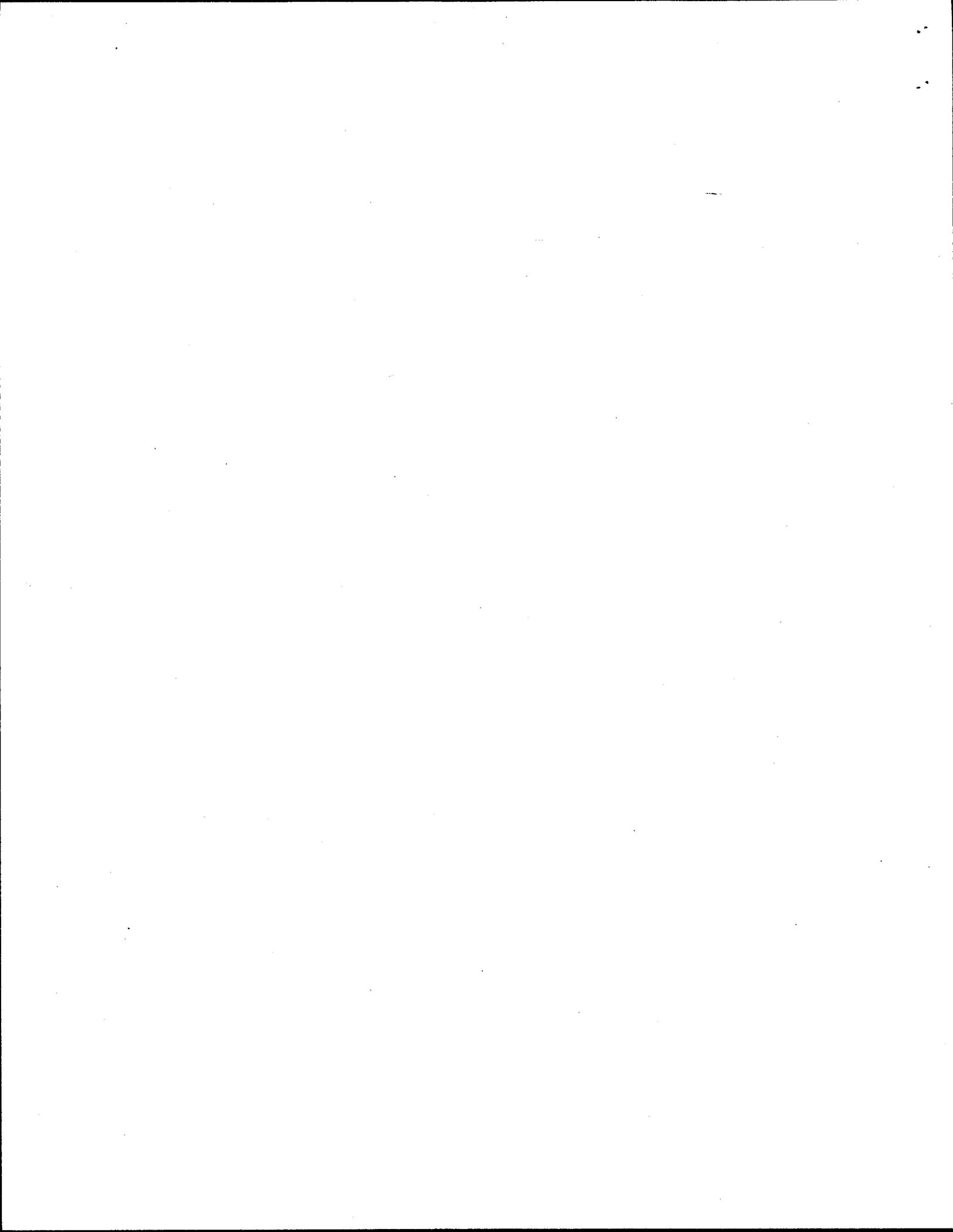
**Attachment 5 - Timeline and Public Process for Adopting 1999 Rule**

**Attachment 6 – Letter from Governor Racicot to Chris Wester**

**Attachment 7 - Biennial Rule adopted February 2, 2001**

**Attachment 8 - Timeline and Public Process for adopting 2001 Rule**

Attachment 1 - SB 445 - reference bill as amended



A&E  
Co. Ed.  
Env.  
FS

Fish  
Parks  
Wild  
Other: Legal

Ag  
Comm.  
Env.  
FS

Fish  
Parks  
Wild

SENATE BILL NO. 445

INTRODUCED BY C. SWYSGOOD, B. TASH

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A BILL FOR AN ACT ENTITLED: "AN ACT, REQUIRING GUIDES, PROFESSIONAL GUIDES, AND  
OUTFITTERS WHO WISH TO OPERATE ON ~~THE BEAVERHEAD OR BIG HOLE~~ MONTANA RIVERS TO  
OBTAIN AND DISPLAY ~~A BEAVERHEAD/BIG HOLE RIVERS~~ AN OUTFITTER BOAT TAG; PROVIDING  
RESTRICTIONS ON OUTFITTING AND GUIDING ACTIVITY ON ~~THESE~~ THE BEAVERHEAD AND BIG HOLE  
RIVERS; URGING THE BIG HOLE WATERSHED GROUP AND BEAVERHEAD COUNTY COMMUNITY FORUM  
~~TO COORDINATE WITH OTHERS~~ DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO FACILITATE A  
CONSENSUS PROCESS FOR ADDRESSING RIVER CONFLICTS AND TO DEVELOP RIVER RECREATION  
MANAGEMENT PLAN PROPOSALS AND SUGGESTING REQUIREMENTS TO BE INCLUDED IN THE PLANS;  
ESTABLISHING AN ACCOUNT; REQUIRING THE FISH, WILDLIFE, AND PARKS COMMISSION TO DEVELOP  
RULES REGARDING IMPLEMENTATION OF RECREATION RESOURCE MANAGEMENT PLANS FOR THE  
BEAVERHEAD AND BIG HOLE RIVERS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. ~~Beaverhead/Big Hole Rivers~~ OUTFITTER BOAT tag -- legislative findings

-- requirements -- administration. (1) Because of increased concern as to the use levels on certain rivers  
in Montana and the user conflicts, resource and property damage concerns, and demands upon limited  
public facilities related to those use levels, the legislature finds it necessary to distribute river recreation  
use as well as the economic benefits gained from river use through the requirements of this section.

(2) Beginning March 1, 2000, a person may not operate as a guide, professional guide, or outfitter  
on the waters of the ~~Beaverhead River or Big Hole River~~ THIS STATE without first obtaining a  
~~Beaverhead/Big Hole Rivers~~ AN OUTFITTER BOAT tag, as required by this section. The tag must be displayed,  
in a manner visible to enforcement personnel, on watercraft used for outfitting or guiding activity on these  
rivers. THE TAG ASSIGNED MUST INCLUDE THE LICENSEE'S NUMBER AND BE OF A DISTINCTIVE COLOR AND DESIGN, READ  
FROM LEFT TO RIGHT IN ARABIC NUMERALS AND BLOCK CHARACTERS OF GOOD PROPORTION AND AT LEAST 3 INCHES  
TALL, EXCLUDING BORDER OR TRIM.

(3) The board shall issue a tag to a person if that person meets all of the following requirements:



1 (a) The person has a valid guide, professional guide, or outfitter license issued by the board.

2 (b) ~~The EXCEPT AS PROVIDED IN SUBSECTION (3)(D), THE operating plan on file with the board AS OF~~  
3 JANUARY 1, 1999 under which the person will operate includes EITHER the Beaverhead and OR Big Hole  
4 Rivers RIVER within the stated boundaries of the operation.

5 (c) The operating plan under which the person will operate has been amended to reflect all of the  
6 following for outfitting and guiding activity on the Beaverhead or Big Hole Rivers:

7 (i) ~~Commercial launches on these rivers will be on weekdays only~~ AN OUTFITTER WILL LIMIT LAUNCHES  
8 TO TWO BOATS AT EACH STATE OR FEDERAL RIVER ACCESS SITE EACH DAY.

9 (ii) ~~The number of weekly commercial launches of individual craft will be limited to the running~~  
10 ~~historic average of the number of the outfitter's craft launched for the same week in which the outfitter~~  
11 ~~used the river in past years, based on records on file with the board or with the department of fish,~~  
12 ~~wildlife, and parks as of January 1, 1999~~ AN OUTFITTER'S TOTAL ANNUAL USE OF THE BEAVERHEAD AND BIG  
13 HOLE RIVERS WILL NOT EXCEED THE GREATER OF EITHER:

14 (A) THE OUTFITTER'S ANNUAL AVERAGE USE FOR THE YEARS 1995 THROUGH 1998; OR

15 (B) THE OUTFITTER'S ACTUAL USE FOR THE YEAR ENDING DECEMBER 31, 1998.

16 (iii) A commercially launched watercraft will not contain more than four persons.

17 (d) A LICENSED OUTFITTER WHO HAD APPLIED TO INCLUDE THE BEAVERHEAD OR BIG HOLE RIVER IN THE  
18 OUTFITTER'S OPERATING PLAN PRIOR TO MARCH 31, 1999, BUT WHO HAS NOT GENERATED ANY HISTORICAL USE ON  
19 THE BEAVERHEAD OR BIG HOLE RIVER MAY ALSO BE ISSUED A TAG TO OPERATE ON THOSE RIVERS PURSUANT TO THIS  
20 SECTION. IF HISTORICAL USE IS THE RECOMMENDED MEASUREMENT OF USE IN DETERMINING FUTURE COMMERCIAL USE  
21 ALLOCATION ON THE BEAVERHEAD RIVER OR THE BIG HOLE RIVER BY AN OUTFITTER PURSUANT TO THIS SUBSECTION  
22 (3)(D), HISTORICAL USE MAY INCLUDE ONLY THAT OUTFITTER'S ACTUAL USE DURING 1999 OR A TOTAL OF 250  
23 LAUNCHES, WHICHEVER IS LESS.

24 (4) FOR THE PURPOSES OF SUBSECTION (3), A LAUNCH IS THE EQUIVALENT OF 2 CLIENT DAYS.

25 (5) IN CALCULATING THE USE PURSUANT TO SUBSECTION (3)(C)(II), AN OUTFITTER SHALL USE THE SAME TIME  
26 PERIODS FOR BOTH RIVERS AND MAY NOT COMBINE PERIODS OF USE FROM BOTH RIVERS FOR ONE RIVER'S  
27 CALCULATIONS.

28 (6) SUBJECT TO SUBSECTION (7), AN OUTFITTER WHO HAS HAD AN OPERATING PLAN ON FILE WITH THE BOARD  
29 PRIOR TO JANUARY 1, 1999, THAT INCLUDES EITHER THE BEAVERHEAD AND OR BIG HOLE RIVERS RIVER OR AN  
30 OUTFITTER WHO MEETS THE QUALIFICATIONS OF SUBSECTION (3)(D) IS ALLOWED A MINIMUM OF 90 TOTAL LAUNCHES

1 EACH YEAR, ALLOCATED PROPORTIONATELY BETWEEN THE BEAVERHEAD AND BIG HOLE RIVERS BASED ON THE  
 2 OUTFITTER'S ACTUAL HISTORIC USE ON EACH RIVER OR ON THE USE SPECIFIED IN SUBSECTION (3)(D), IF APPLICABLE.

3 (7) THE BOARD SHALL DEVELOP RULES THAT LIMIT THE NUMBER OF OUTFITTERS THAT ARE GUARANTEED A  
 4 MINIMUM OF 90 LAUNCHES. THE RULES MUST ADDRESS HOW THE APPLICATION OF HISTORICAL USE PATTERN  
 5 INFORMATION MAINTAINED BY THE BOARD IS USED TO DETERMINE THE LIMITS.

6 (8) FROM THE THIRD SATURDAY IN MAY THROUGH LABOR DAY OF ANY YEAR, A COMMERCIAL OUTFITTER OR  
 7 GUIDE MAY NOT LAUNCH ANY BOATS ON SATURDAYS AND SUNDAYS IN THE FOLLOWING AREAS:

8 (A) ON THE BIG HOLE RIVER FROM JERRY CREEK FISHING ACCESS SITE TO THE SALMONFLY FISHING ACCESS  
 9 SITE; AND

10 (B) ON THE BEAVERHEAD RIVER FROM CLARK CANYON DAM TO THE HENNEBERRY FISHING ACCESS SITE.

11 ~~(4)~~(9) It is the responsibility of the relevant outfitter to provide to the board the operating plan  
 12 amendment required by subsection (3), including documentation for the calculation of allowed launches.  
 13 The board shall process an application for amendment as provided by rule and may reject an application  
 14 for inadequate proof of claimed historic river use levels.

15 ~~(5)~~(10) ~~A Beaverhead/Big Hole Rivers~~ AN OUTFITTER'S BOAT tag must be issued free of charge FOR  
 16 \$10 to a Montana resident who has met the criteria of this section and applicable rules. Nonresidents shall  
 17 pay \$250 to purchase or renew a tag, if otherwise qualified. A tag is valid for the licensing year in which  
 18 it is issued and is not transferable. ISSUANCE OF A TAG MAY NOT BE CONSTRUED AS CONFERRING A PROPERTY  
 19 RIGHT. The board shall deposit and use tag sale proceeds as provided in ~~37-47-306~~ SUBSECTION (12).

20 ~~(6) Persons operating as a guide, professional guide, or outfitter for purposes of accompanying~~  
 21 ~~participants for nonwatercraft-oriented fishing from land owned by the state may conduct these~~  
 22 ~~commercial activities only on weekdays that are not holidays.~~

23 ~~(7)~~(11) The board shall develop rules to administer and enforce this section.

24 (12) THERE IS AN ACCOUNT IN THE STATE SPECIAL REVENUE FUND. MONEY COLLECTED FROM THE PURCHASE  
 25 OF TAGS PURSUANT TO THIS SECTION MUST BE DEPOSITED IN THE ACCOUNT FOR USE BY THE BOARD OF OUTFITTERS TO  
 26 BE EXPENDED FOR THE PREPARATION AND ISSUANCE OF OUTFITTER BOAT TAGS AND APPROPRIATE SIGNAGE. IN ADDITION,  
 27 MONEY RECEIVED IN THE FORM OF GIFTS, GRANTS, DONATIONS, OR APPROPRIATIONS FROM ANY OTHER SOURCE MAY  
 28 ALSO BE DEPOSITED IN THE ACCOUNT AND USED FOR COMMERCIAL USE MITIGATION MEASURES THAT INCLUDE LEASING  
 29 OR OTHER ARRANGEMENTS WITH LANDOWNERS FOR INSTALLATION AND MAINTENANCE OF WASTE MANAGEMENT AND  
 30 FOR STREAMBANK AND SOIL STABILIZATION RELATED TO WASTE MANAGEMENT. FUNDING FOR COMMERCIAL USE

1 MITIGATION MEASURES MUST BE JOINTLY ADMINISTERED BY THE BOARD OF OUTFITTERS AND THE DEPARTMENT OF FISH,  
 2 WILDLIFE, AND PARKS.

3  
 4 NEW SECTION. Section 2. Development of recreation resource management plan - RULES. (1)

5 The legislature urges the Big Hole watershed group and the Beaverhead County community forum to  
 6 coordinate with other stakeholders in the area AND OTHER RECREATIONISTS OR INTERESTED PARTIES DEPARTMENT  
 7 OF FISH, WILDLIFE, AND PARKS TO FACILITATE A GROUP OF INTERESTED PARTIES FROM THROUGHOUT THE STATE TO  
 8 PARTICIPATE IN A CONSENSUS PROCESS FOR ADDRESSING CONFLICTS ON THE BEAVERHEAD AND BIG HOLE RIVERS AND  
 9 to develop proposed recreation resource management plans for the Beaverhead and Big Hole Rivers.

10 (2) SHOULD USE ALLOCATION BE ALLOWED FOR OUTFITTERS IN THE MANAGEMENT PLAN, THE LEGISLATURE  
 11 URGES THAT THOSE ALLOCATIONS BE GOVERNED BY THE FOLLOWING REQUIREMENTS:

12 (A) ANY ALLOCATIONS FOR USE TO OUTFITTERS MAY NOT BE BASED ON HISTORICAL USE AND MAY NOT  
 13 DISPLACE HISTORICAL PUBLIC RECREATIONAL USE.

14 (B) ALLOCATIONS FOR USE TO OUTFITTERS ARE NOT PRIVATE PROPERTY AND MUST BE REALLOCATED WHEN USE  
 15 IS DISCONTINUED.

16 (3) The legislature urges that the proposed plans be presented to the department of fish, wildlife,  
 17 and parks COMMISSION by October 1, 2000 JULY JANUARY 1, 2001, for department COMMISSION  
 18 consideration and as a basis for potential legislative recommendations.

19 (4) (A) UPON RECEIPT OF THE PROPOSED MANAGEMENT PLAN AND AFTER DUE CONSIDERATION, THE  
 20 COMMISSION SHALL ADOPT RULES IMPLEMENTING RECREATION RESOURCE MANAGEMENT PLANS FOR THE BEAVERHEAD  
 21 AND BIG HOLE RIVERS, BASED ON THE PROPOSALS DEVELOPED UNDER SUBSECTION (1). RULES MUST BE ADOPTED  
 22 PURSUANT TO TITLE 2, CHAPTER 4, PART 3.

23 (B) THE RULES MUST INCLUDE PROVISIONS FOR THE ADEQUATE REGULATION AND ENFORCEMENT OF THE  
 24 RECREATION RESOURCE MANAGEMENT PLAN. IF COMMERCIAL USE ALLOCATION IS THE METHOD SELECTED AND  
 25 HISTORICAL USE IS THE MEASUREMENT OF USE, THE RULES MUST PROVIDE THAT COMMERCIAL USE GENERATED AFTER  
 26 JANUARY 1, 1999, MAY NOT BE INCLUDED IN DETERMINING COMMERCIAL USE ALLOCATION, EXCEPT AS PROVIDED IN  
 27 [SECTION 1(3)(D)].

28 (C) RULES MUST INCLUDE PROVISIONS FOR A SUITABLE WASTE MANAGEMENT PLAN ALONG THE RIVERS.

29 (5) IF WATERSHED GROUPS, COMMUNITY FORUMS, AREA STAKEHOLDERS, RECREATIONISTS, AND OTHER  
 30 INTERESTED PARTIES EXPERIENCE INCREASED CONCERN AS TO THE USE LEVELS ON ANOTHER RIVER IN MONTANA AND

1 AS TO USER CONFLICTS, RESOURCE AND PROPERTY DAMAGE CONCERNS, AND DEMANDS UPON LIMITED PUBLIC FACILITIES  
2 RELATED TO THOSE USE LEVELS, A SIMILAR RECREATION RESOURCE MANAGEMENT PLAN MAY BE PROPOSED FOR THAT  
3 OTHER RIVER AND PRESENTED TO THE COMMISSION FOR CONSIDERATION. IF IMPLEMENTATION OF A SIMILAR RESOURCE  
4 MANAGEMENT PLAN RESULTS IN A REDUCTION IN RECREATIONAL USE ON THE RIVER UNDER CONSIDERATION, RULES MUST  
5 PROVIDE THAT THE REDUCTION WILL BE MADE IN COMMERCIAL AND NONRESIDENT USE RATHER THAN IN  
6 NONCOMMERCIAL, RESIDENT USE. ANY RULES DEVELOPED BY THE COMMISSION PURSUANT TO A SIMILAR RECREATION  
7 RESOURCE MANAGEMENT PLAN MUST BE ADOPTED PURSUANT TO TITLE 2, CHAPTER 4, PART 3.

8  
9 NEW SECTION. Section 3. Codification instruction. (1) [Section 1] is intended to be codified as  
10 an integral part of Title 37, chapter 47, part 3, and the provisions of Title 37, chapter 47, part 3, apply  
11 to [section 1].

12 (2) [SECTION 2] IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 87, CHAPTER 1, AND THE  
13 PROVISIONS OF TITLE 87, CHAPTER 1, APPLY TO [SECTION 2].

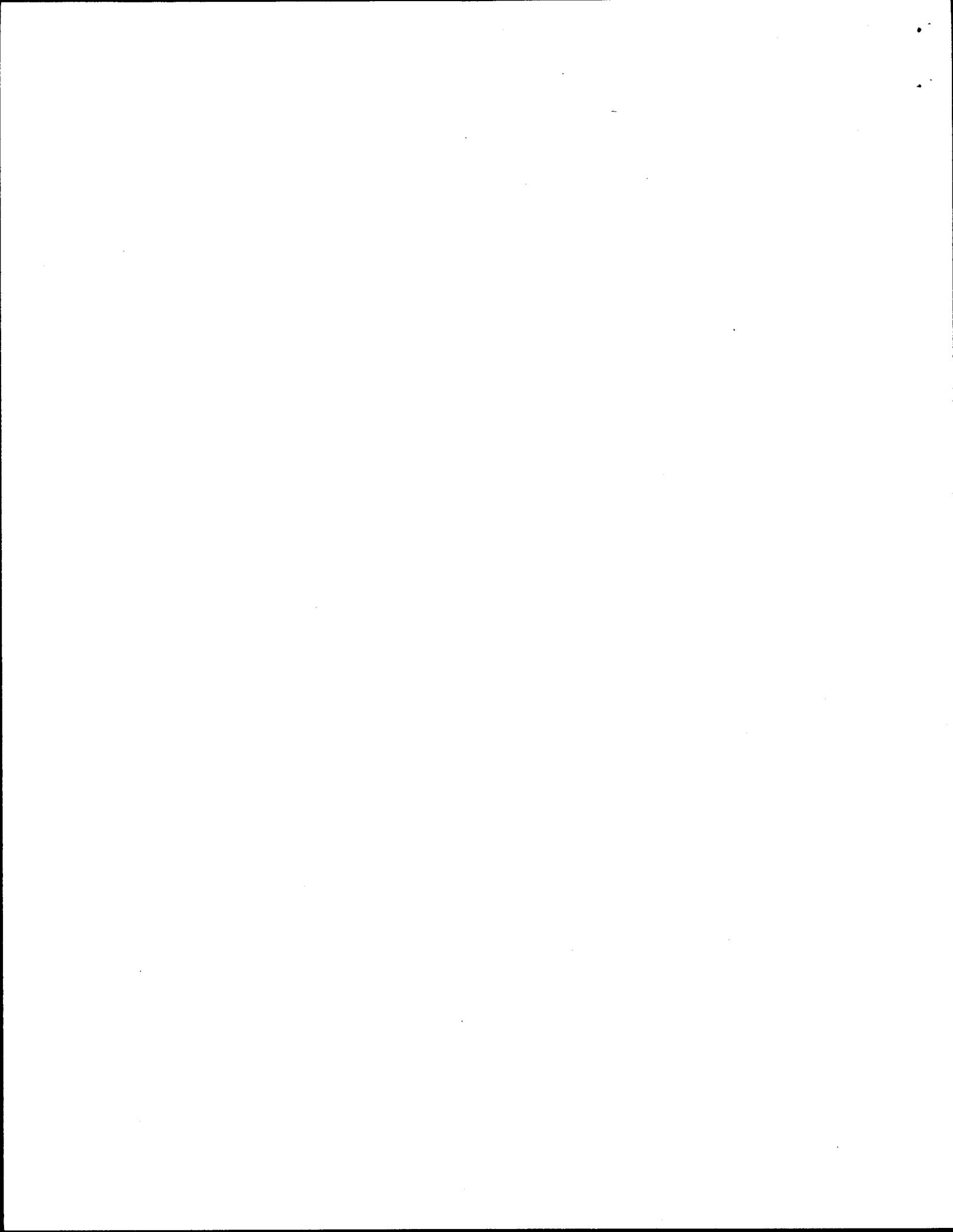
14  
15 NEW SECTION. Section 4. Severability. If a part of [this act] is invalid, all valid parts that are  
16 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its  
17 applications, the part remains in effect in all valid applications that are severable from the invalid  
18 applications.

19  
20 NEW SECTION. Section 5. Effective date. [This act] is effective July 1, 1999 ON PASSAGE AND  
21 APPROVAL.

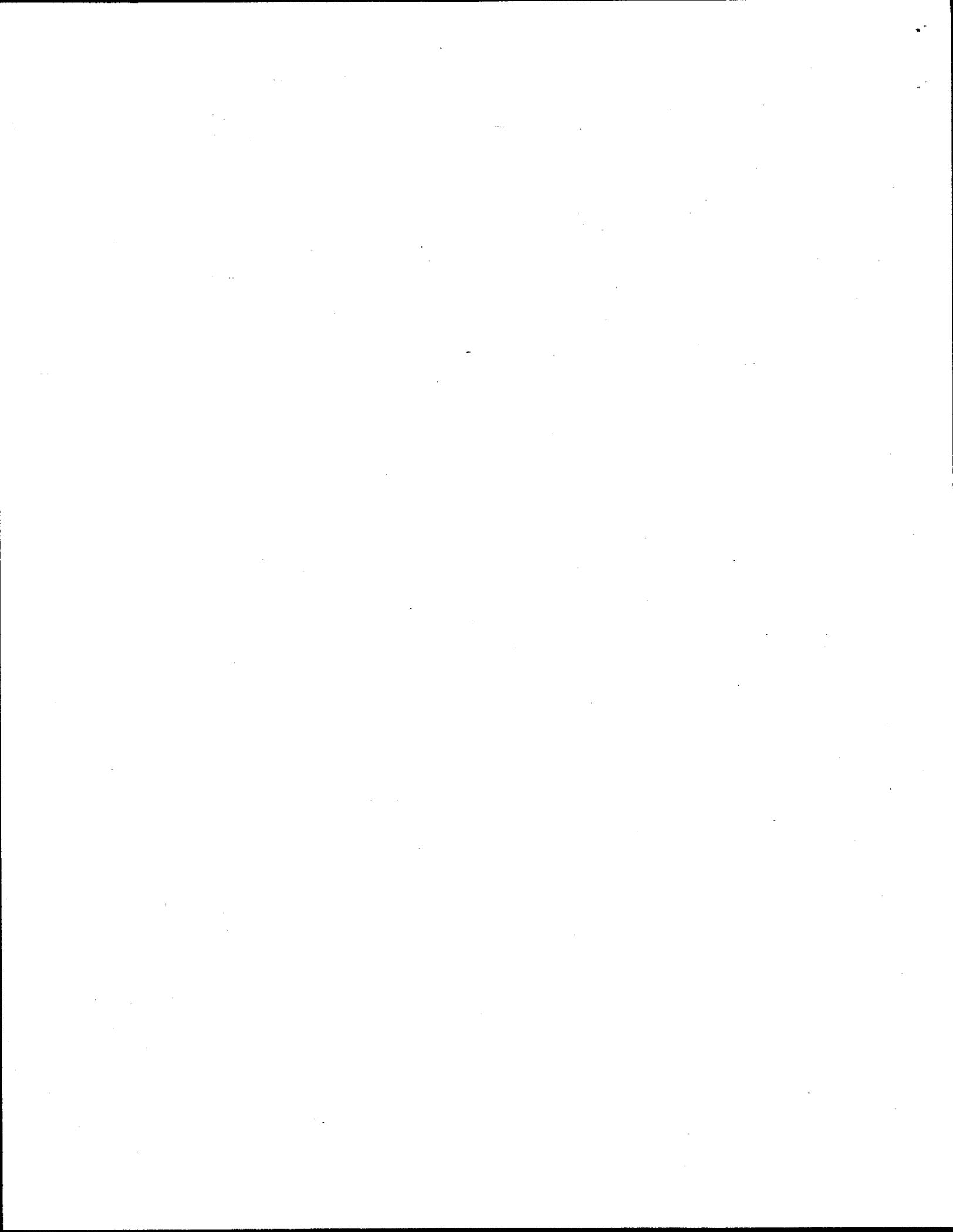
22  
23 ~~NEW SECTION. SECTION 6. TERMINATION. (1) [SECTION 1] TERMINATES FOR THE BIG HOLE RIVER ON THE~~  
24 ~~DATE THAT THE LEGISLATURE ADOPTS A RIVER RECREATION MANAGEMENT PLAN FOR THE BIG HOLE RIVER THAT~~  
25 ~~ADDRESSES LIMITS ON COMMERCIAL OUTFITTING AND GUIDING.~~

26 ~~(2) [SECTION 1] TERMINATES FOR THE BEAVERHEAD RIVER ON THE DATE THAT THE LEGISLATURE ADOPTS A~~  
27 ~~RIVER RECREATION MANAGEMENT PLAN FOR THE BEAVERHEAD RIVER THAT ADDRESSES LIMITS ON COMMERCIAL~~  
28 ~~OUTFITTING AND GUIDING.~~

29 - END -



**Attachment 2 - Veto letter**



OFFICE OF THE GOVERNOR  
STATE OF MONTANA

*FJE*

MARC RACICOT  
GOVERNOR



STATE CAPITOL  
HELENA, MONTANA 59620-0801

May 10, 1999

The Honorable Bruce Crippen  
President of the Senate  
State Capitol  
Helena, MT 59620

The Honorable John Mercer  
Speaker of the House  
State Capitol  
Helena MT 59620

Dear President Crippen and Speaker Mercer:

In accordance with the power vested in me as Governor by the Constitution and laws of the State of Montana, I hereby veto Senate Bill 445, "AN ACT REQUIRING GUIDES, PROFESSIONAL GUIDES, AND OUTFITTERS WHO WISH TO OPERATE ON MONTANA RIVERS TO OBTAIN AND DISPLAY AN OUTFITTER BOAT TAG; PROVIDING RESTRICTIONS ON OUTFITTING AND GUIDING ACTIVITY ON THE BEAVERHEAD AND BIG HOLE RIVERS; URGING THE DEPARTMENTS OF FISH, WILDLIFE, AND PARKS TO FACILITATE A CONSENSUS PROCESS FOR ADDRESSING RIVER CONFLICTS AND TO DEVELOP RIVER RECREATION MANAGEMENT PLAN PROPOSALS AND SUGGESTING REQUIREMENTS TO BE INCLUDED IN THE PLANS; ESTABLISHING AN ACCOUNT; REQUIRING THE FISH, WILDLIFE, AND PARKS COMMISSION TO DEVELOP RULES REGARDING IMPLEMENTATION OF RECREATION RESOURCE MANAGEMENT PLANS FOR THE BEAVERHEAD AND BIG HOLE RIVERS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE" for the following reasons.

Senate Bill 445, as it was originally introduced, addressed concerns of local groups in southwestern Montana about the increasing amount of floating use on parts of the Beaverhead and Big Hole Rivers. The bill limited commercial use of the two rivers beginning in March, 2000, and urged local groups to develop river management plans by October, 2000, in time for consideration by the Department of Fish, Wildlife, and Parks and possible legislative action by the Legislature in 2001.

The objectives of the introduced bill were laudable. However, in the final hours of the legislative session, amendments were added to Senate Bill 445, which pose significant legal and implementation problems. Although it is quite possible that some of the results of the amendments were unintentional, the agencies of state government that are directed to implement the bill may not legally interpret it in any manner other than that which is consistent with the clear meaning of its language.

The first rule of statutory construction requires that when construing a statute, a court must simply ascertain and declare what is in plain terms or in substance contained in the statute, "not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. The Montana Supreme Court has consistently held that when the terms of a statute are plain, unambiguous, direct, and certain, the statute speaks for itself and there is no room for construction.

The language in section 1 of Senate Bill 445 states that beginning March 1, 2000, a person may not operate as a guide or outfitter "on the waters of this state" without first obtaining an outfitter boat tag that is to be issued if a person meets "all of the following requirements." One requirement set forth in the bill is that the individual must have filed with the Montana Board of Outfitters by January 1, 1999, an operating plan that includes either the Beaverhead or Big Hole River. The result may have been unintentional, but the language is plain, unambiguous, direct, and certain — a guide or outfitter whose business did not include the Beaverhead or Big Hole River as of January 1, 1999, and who therefore cannot qualify for a tag, may not operate on any of Montana's waters after March 1, 2000.

Section 1 of Senate Bill 445 further limits the amount of use that an individual who is issued a tag may make of the Beaverhead and Big Hole Rivers, by measuring the historic use by that outfitter through 1998, or, in the case of licensed outfitters without any historic use on the two rivers, by imposing an annual cap of 250 launches. Whereas the introduced bill created a moratorium on new commercial use of the two rivers, the amendments to Senate Bill 445 actually allow some room for growth in commercial use even though those amendments have been characterized as a "moratorium."

In addition, several parts of the bill are contradictory. In one subsection the bill requires that any outfitter who receives a tag is allowed a minimum of 90 launches a year, but the next subsection directs the Board of Outfitters to develop rules that *limit* the number of outfitters who are guaranteed a minimum of 90 launches. Section 1 requires the Board of Outfitters to adopt rules limiting the amount of commercial use of the two rivers, using historic use as the basis for such rules. Yet section 2 directs the Fish, Wildlife, and Parks Commission to adopt rules to implement recreation resource management plans for the two rivers, and "urges" that historic use *not* be the basis for allocations for outfitter use. How to coordinate the two sets of rules, set by two different boards, would be a conundrum at best.

Finally, Senate Bill 445 provides that management plans similar to those facilitated for the Big Hole and Beaverhead Rivers may be submitted to the Commission for other of the

State's rivers, and that if implementation of a management plan results in a reduction in recreational use on a river, rules must provide that the reduction will be made in "commercial and nonresident use rather than in noncommercial, resident use." If the requirement means that before restricting any resident use, nonresident use must be restricted, even to the point that it is precluded altogether, it arguably results in unconstitutional discrimination under the U.S. Constitution's Equal Protection Clause of the Fourteenth Amendment or the Privileges and Immunities Clause.

In vetoing Senate Bill 445, I offer a possible solution to the problems believed to exist on the Big Hole and Beaverhead Rivers, and to other state waters as well, with respect to the apparent rapid increase in floating use and the possibility that certain rivers could become overrun by outfitters trying to establish historic use before any plan could be completed. Under rulemaking authority given to the Fish, Wildlife, and Parks Commission by House Bill 626, which takes effect June 1, 1999, the Commission may adopt rules addressing conflicts on rivers, including the regulation of commercial use based on recreational use of fishing or floating. The Commission did not have this expanded authority before passage of House Bill 626 and could only adopt and enforce rules addressing conflicts that posed threats to health, safety, or property. Given the broader authority granted by House Bill 626, the Commission could establish moratoriums on new commercial use and develop river recreation management plans for the Big Hole and Beaverhead Rivers as well as other state waters when the need arises, and adopt rules implementing those plans. In this way, the problems could be addressed relatively soon and would not have to await consideration by the 2001 Legislature.

I intend to urge the Commission to undertake a rulemaking effort patterned after Senate Bill 445, to create a moratorium on new commercial use by adopting without delay short-term rules in reference to the Big Hole and Beaverhead Rivers. I have already asked the Department of Fish, Wildlife, and Parks to begin preparing recommendations to the Commission along this line.

Sincerely,



MARC RACICOT  
Governor



# Montana Fish, Wildlife & Parks

## MEMORANDUM

**TO:** Fish, Wildlife & Parks Commission

**FROM:** Pat Graham 

**DATE:** May 7, 1999

**RE:** SB 445 and proposed Commission Rules

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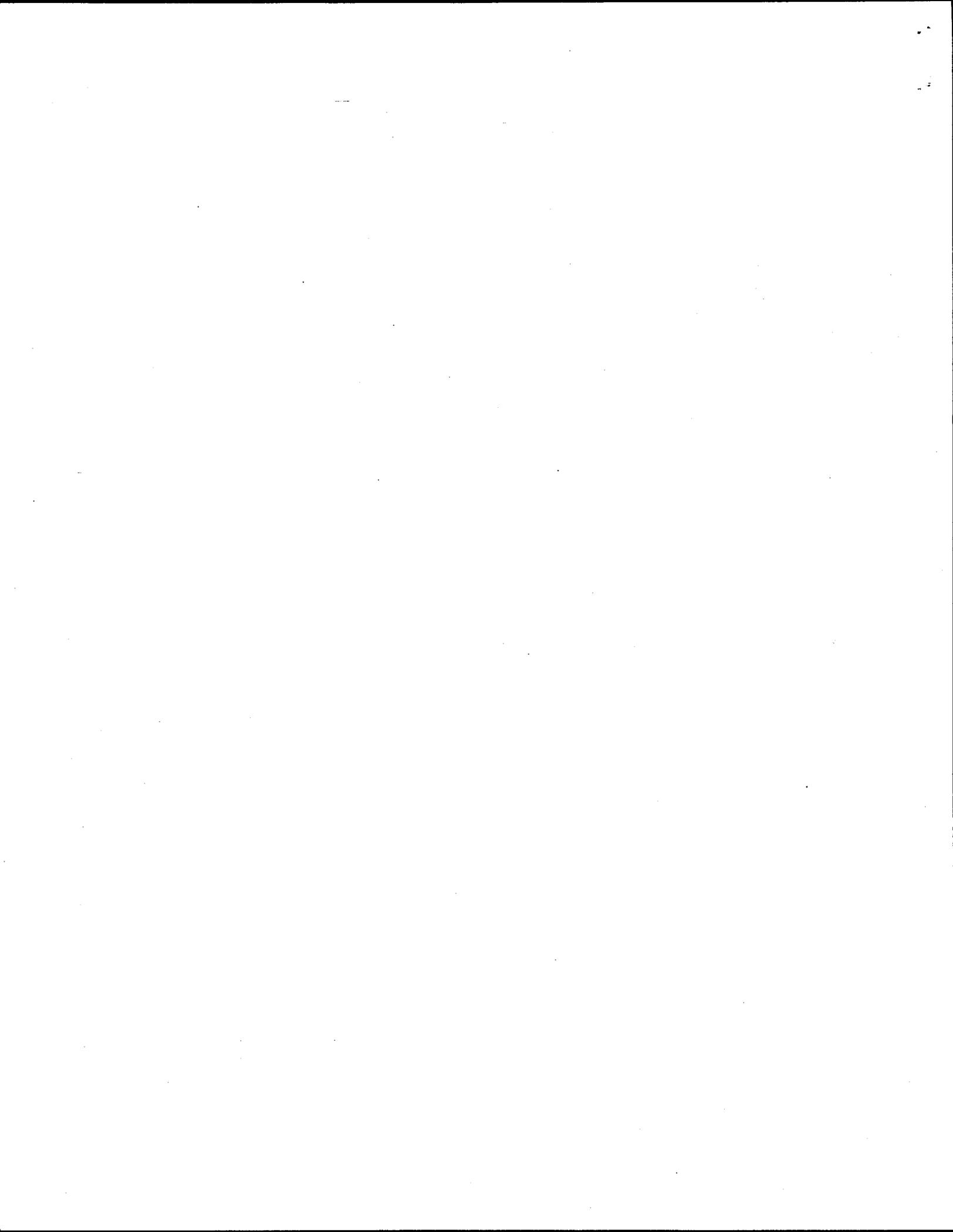
Senator Swysgood from Dillon sponsored a bill in the 1999 Legislative Session (SB 445) that would have addressed conflicts in use on the Beaverhead and Big Hole Rivers. SB 445 would have required that outfitters obtain a boat tag before operating on rivers of the state, placed a form of a moratorium on use of the Beaverhead and Big Hole Rivers, and required that a recreation resource management plan be developed for the two rivers.

On the last day of the legislative session, SB 445 passed both houses, but was amended substantially. The bill had a number of technical problems, some provisions that might be unconstitutional, and some questions of legislative intent remained unanswered. Nonetheless, public concern for use of the Beaverhead and Big Hole Rivers demonstrated a need for a process to address those concerns. SB 445 also created a public expectation that some form of moratorium on use on the Beaverhead and Big Hole Rivers be put in place.

The Governor vetoed SB 445 because of its technical problems and constitutional issues that it raised. In explaining his reasons for the veto, the Governor noted that HB 626 gave the Commission the authority to adopt rules addressing conflicts on rivers. Therefore, the Governor directed the Commission to adopt rules to address the concerns that SB 445 addressed. HB 626, the bill that gave the Commission the authority to adopt these rules, is effective June 1, 1999. The intent is for rules to be in place by June 1 to ensure that there is not a rush of outfitter use on the Beaverhead and Big Hole Rivers this summer in attempts to establish greater historic use. Enclosed with this memo is a draft of a biennial rule for the Commission to consider.

The draft biennial rule is based on language from SB 445. It would put a simple moratorium in place until the Commission adopts recreation management plans and implementing rules for the Beaverhead and Big Hole Rivers. The draft rule distributes outfitter use of the Beaverhead and Big Hole Rivers based on historical use. An outfitter will be limited to the greater of his or her

**Attachment 3 - Interim Biennial Rule adopted  
June 29, 1999 and Amended January 12, 2001**



STATE OF MONTANA

FISH, WILDLIFE & PARKS COMMISSION

AMENDED FINAL BIENNIAL RULE

**INTERIM DISTRIBUTION OF RIVER RECREATION USE AND RECREATION RESOURCE MANAGEMENT PLANS FOR THE BEAVERHEAD AND BIG HOLE RIVERS**

I. STATEMENT OF LEGAL AUTHORITY FOR RULE

Section 87-1-303, MCA, gives the Commission the authority to adopt and enforce rules governing recreational uses of waters for public health, public safety, and protection of property. As amended by House Bill 626 in the 1999 Legislative Session, § 87-1-303, MCA, also gives the Commission the authority to adopt such rules in the interest of public welfare and the protection of public resources. Therefore, § 87-1-303, MCA, gives the Commission comprehensive authority to adopt rules addressing use conflicts on rivers such as the use conflicts posed on the Beaverhead and Big Hole Rivers.

II. DISTRIBUTION OF USE ON THE BEAVERHEAD AND BIG HOLE RIVERS

- A. Because of increased concern about use of the Beaverhead and Big Hole Rivers and user conflicts, resource and property damage concerns, and demands upon limited public facilities related to those use levels, the Commission finds it necessary to manage river recreation use on the Beaverhead and Big Hole Rivers.
- B. This management of use will remain in place for the Beaverhead River until the Commission adopts a recreation resource management plan and implementing rules for the Beaverhead River and will remain in use for the Big Hole River until the Commission adopts a recreation resource management plan and implementing rules for the Big Hole River.
- C. Once in place, the Beaverhead and the Big Hole River recreation plans and implementing rules will supersede the management of use as established in this section.
- D. A person may not operate on the Beaverhead or Big Hole Rivers without complying with requirements of this section. The Commission shall distribute outfitter use of the Beaverhead and Big Hole Rivers as follows:
  - (1) An outfitter with documented use of the Beaverhead River prior to December 31, 1998 may continue to operate on this river during development of the recreation resource management plan for the Beaverhead River.
  - (2) An outfitter with documented use of the Big Hole River prior to December 31, 1998 may continue to operate on this river during development of the recreation resource

management plan for the Big Hole River.

- (3) An outfitter who has not documented use of the Beaverhead River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and ~~March 31~~ July 1, 1999 and his/her operating plan included the Beaverhead River.
- (4) An outfitter who has not documented use of the Big Hole River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and ~~March 31~~ July 1, 1999 and his/her operating plan included the Big Hole River.
- (5) Beginning January 1, 2000, from the third Saturday in May through Labor Day of any year, a commercial outfitter or guide may not operate any boats for commercial purposes on Saturdays in the following areas:
  - (a) on the Big Hole River from the Jerry Creek fishing access site to the Salmonfly fishing access site; and
  - (b) on the Beaverhead River from Clark Canyon Dam to the Henneberry fishing access site.
- (6) For the purposes of Section II and III, documented use means use reported on an outfitter Fishing Stat Sheet – Outfitter Use Levels form (commonly referred to as a Tally Sheet) filed with the Board of Outfitters.

### III. COMMISSION POLICY FOR DEVELOPMENT OF RECREATION RESOURCE MANAGEMENT PLANS AND RULES FOR THE BEAVERHEAD AND BIG HOLE RIVERS

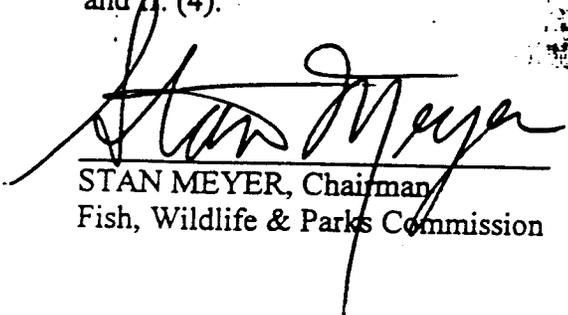
- A. The Commission shall adopt recreation resource management plans for the Beaverhead and Big Hole Rivers.
- B. The Fish, Wildlife & Parks Commission directs the Department of Fish, Wildlife & Parks to facilitate a group of interested parties from within the watersheds and across the state to participate in a public process for addressing conflicts on the Beaverhead and Big Hole Rivers. The Department shall present to the Commission no later than December 1, 2000, recommended recreation resource management plans resulting from the public process.
- C. In developing the recreation resource management plans for the Beaverhead and Big Hole Rivers, the Commission will consider the recommendations from the public process.
- D. The Commission requests that the proposed recreation resource management plans not base commercial floating opportunity on historical use and that care be taken so no plan creates vested property rights for commercial operators.
- E. Interim management decisions will not set a precedent for future management plan decisions and should not limit consideration of alternative solutions.
- F. The management plans should seek to develop options that are cost effective and the least regulatory to address the problem.

IV. EFFECTIVE DATES OF THESE RULES.

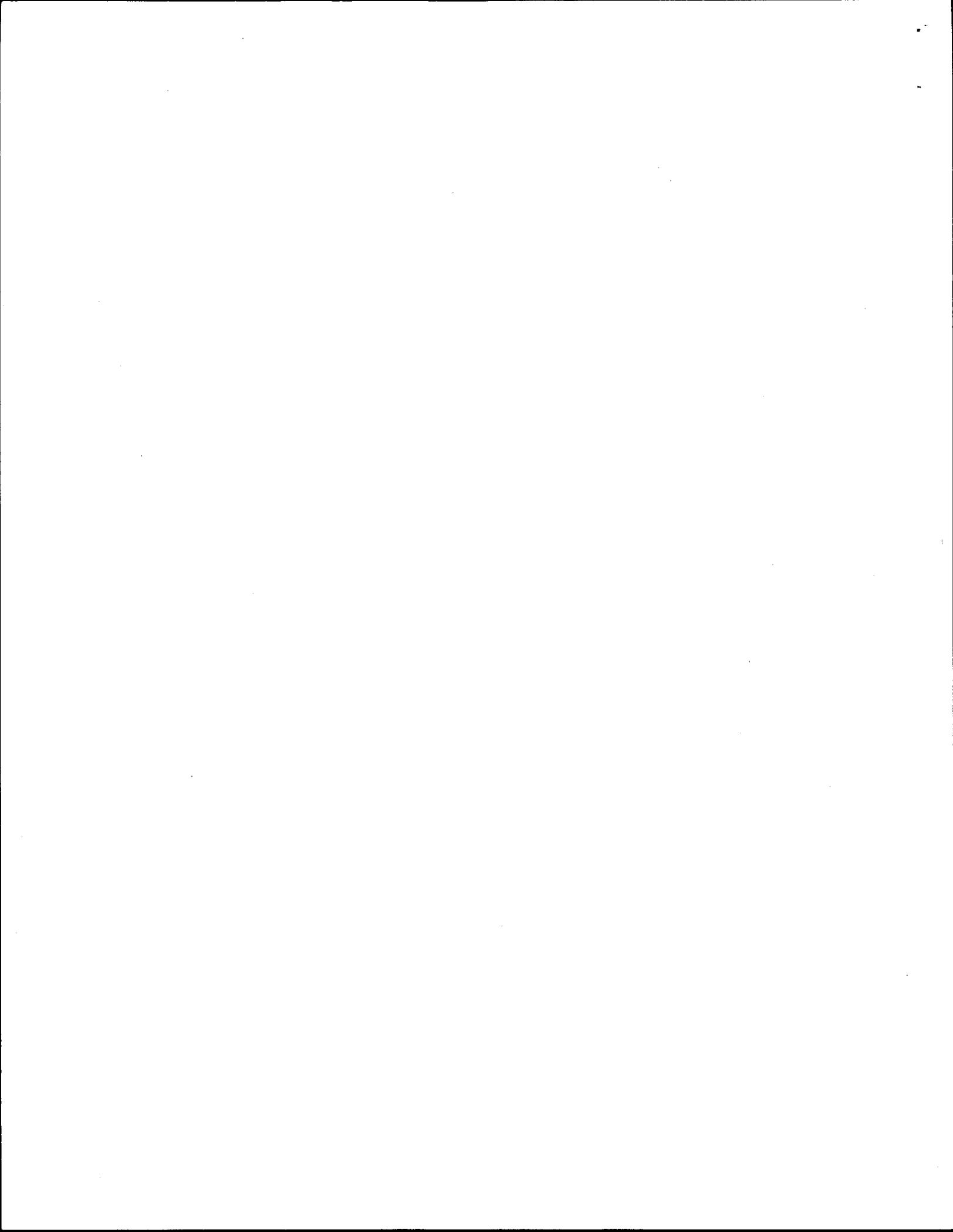
These rules are effective from July 1, 1999 through May 1, 2001 unless superseded pursuant to Rule II, subsections B and C.

The rule was initially adopted on June 29, 1999.

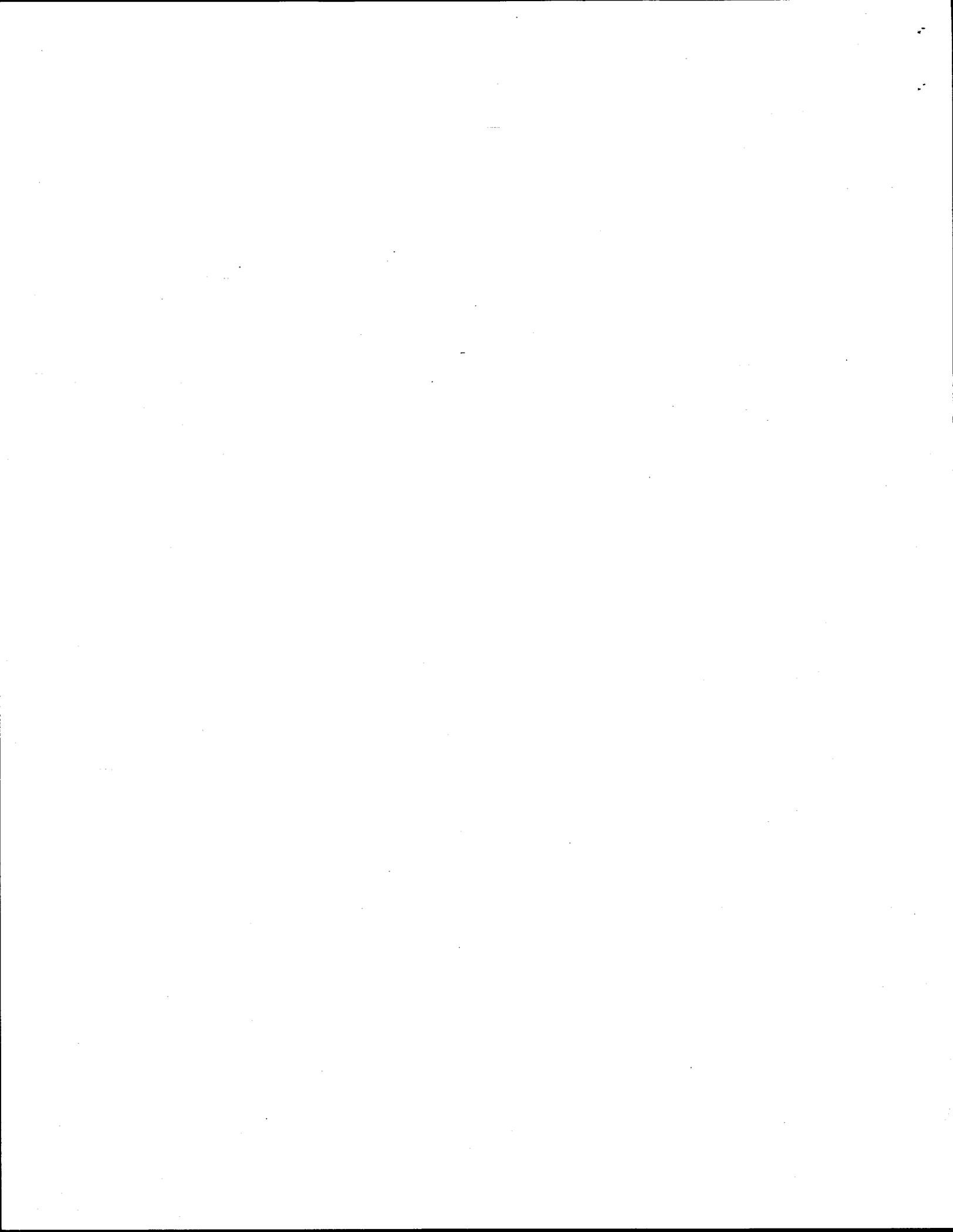
The amended rule was adopted on January 12, 2000 by the Fish, Wildlife and Parks Commission. The amendments are shown by interlining and underlining in paragraphs II. (3) and I. (4).



STAN MEYER, Chairman  
Fish, Wildlife & Parks Commission



**Attachment 4 – June 15, 2000 Commission Policy on the  
Development of Management Plans and Regulations to  
address Recreational Conflicts on Rivers**



**FWP Commission Policy  
on the Development of Management Plans and Regulations  
to Address Recreational Conflicts on Rivers**

**As Adopted by FWP Commission  
June 15, 2000**

**I. PURPOSE**

The purpose of this policy is to provide guidance to the department of fish, wildlife and parks and to advisory committees established by the department or the commission that are developing management plans and regulations to address recreational use conflicts on rivers. This policy relates to the adoption of rules, regulations or management plans under the authority provided in 87-1-303(2), MCA.

**II. DEFINITIONS**

As used in this policy, the following definitions apply:

- (1) "Appropriate for the river" means recreational uses that are consistent with the protection of private property and public resources and which are in the interest of public health, public safety and public welfare. "Appropriate for the river" does not mean that every type of recreational use must be permitted.
- (2) "Reasonable and equitable" means an allocation of recreational use that fairly considers the interests of all types of recreational uses appropriate for the river but is not intended to mean that each type of recreational use must have the exact same share of use.
- (3) "Rivers" means any public river or stream that is legally accessible to the public.
- (4) "Recreational use" includes but is not limited to floating and wade angling; recreational floating; motorized and non-motorized use; private and commercial use; and water fowl hunting.

**III. CONTENT STANDARDS FOR PLANS AND REGULATIONS**

Management plans and regulations to address recreational use conflicts on rivers that are adopted pursuant to 87-1-303(2), MCA, must:

1. Conserve and maintain natural resources and natural processes so that current recreational use does not significantly impair the recreational opportunities of future generations.
2. Provide a reasonable and equitable distribution of opportunity for recreational use among the various types of recreational uses that are appropriate for the river;
3. Be based on data and information about recreational use patterns, trends and conflicts;
4. Be technically, legally, socially and economically feasible for FWP to implement;
5. Resolve conflicts between various recreational uses in ways that have the least adverse impact on recreational users;
6. Seek balance between providing a quality recreational experience and providing an unlimited quantity of recreational opportunities;
7. Consider the implications of the resolution of a recreational use conflicts on other rivers;

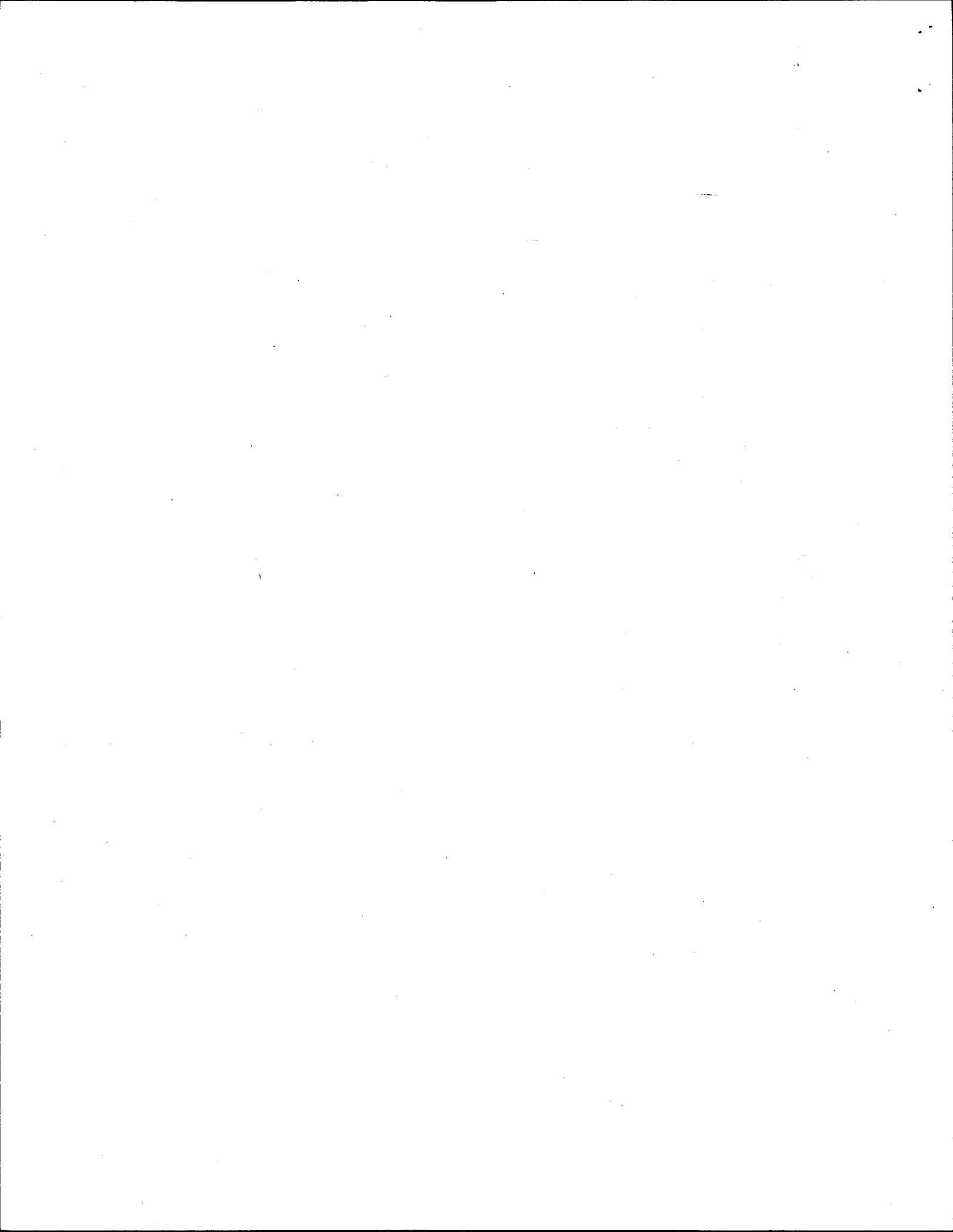
8. Provide mechanisms for monitoring and evaluation to ensure the management plan or regulations achieve their stated goals and objectives;
9. Recognize recreational use of a river is allocated by this Commission, and that the Commission has the authority to modify the allocation or adopt another system of allocation should circumstances or conditions change;
10. Ensure that any allocation of recreational use of a river does not vest or establish in a person or business any right to continue to have an allocation of recreational use in the future, whether the use is for private purposes or part of a commercial venture.

#### IV. PROCESS STANDARDS FOR PLANS AND REGULATIONS

The process used for developing management plans and regulations to address recreational use conflicts on rivers that are adopted pursuant to 87-1-303(2), MCA, must:

1. Be inclusive of the perspectives and interests of the various stake holders in the recreational use conflicts;
2. Be an open and public process that involves and engages recreational users and other affected citizens;
3. Be driven by the physical, biological and social factors that are unique to the river;
4. Result in proposals to be recommended to the FWP Commission for adoption.

**Attachment 5 - Public Process  
for Adopting 1999 Rule**



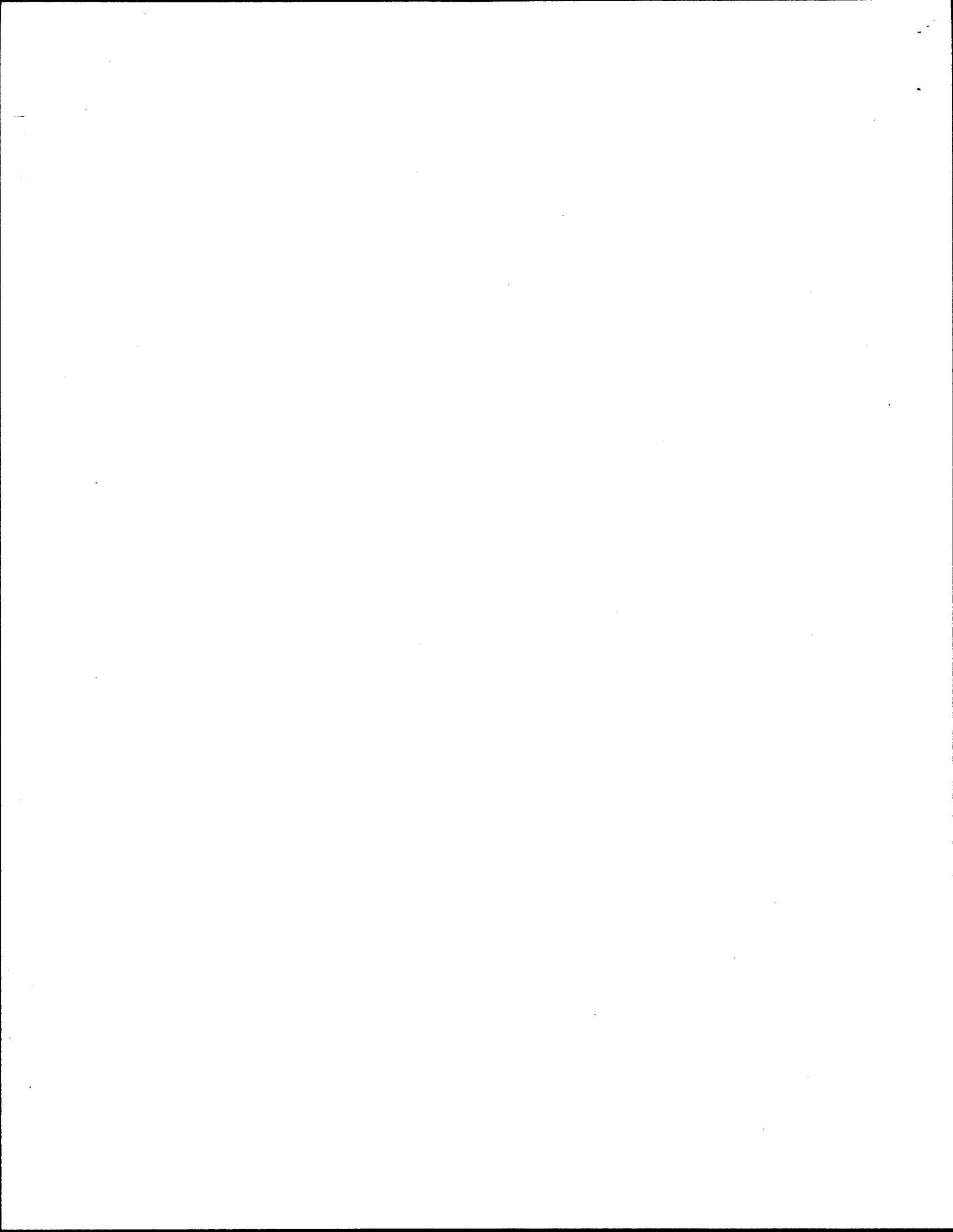
## SUMMARY

### 1999 Rule

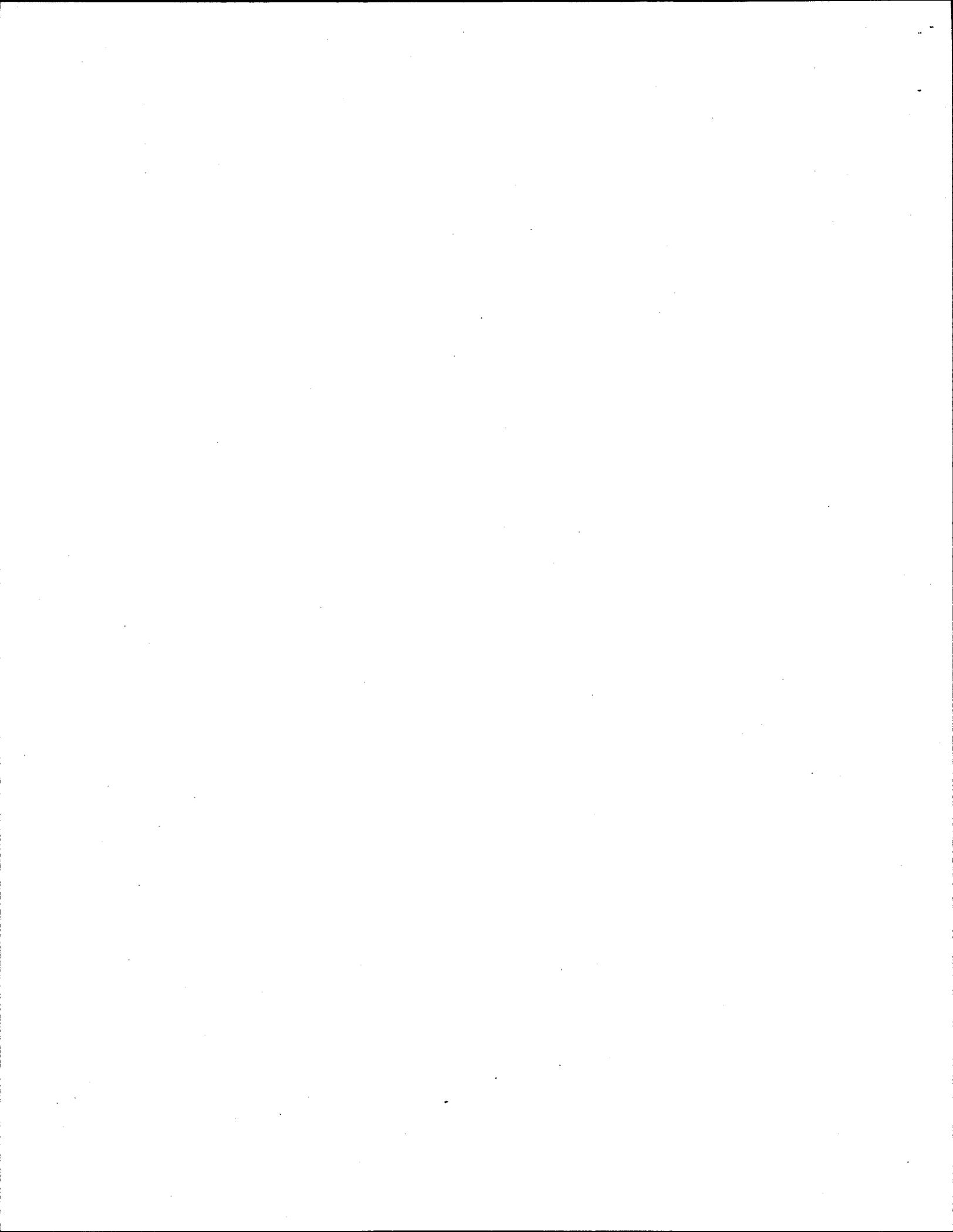
MAPA Administrative Rule Requirement	Biennial Rule Process
Bill sponsor notification when rulemaking begins	Bill Sponsors aware of rulemaking. 5/10/99 Governor vetoed SB445. Governor announces bill veto and urges FWP to make rules. 5/12/99 press release notifying the public that rules were being considered.
Rule notice mailed within three days of publication to individuals on agency's interested persons list, bill sponsor of code section implemented the first time rulemaking is done on code section.	All press releases mailed or emailed to list of over 300 groups and persons. Outfitting trade associations included on list. Press releases announcing proposed rulemaking and meetings.
Rule proposal notice published in the Montana Administrative Register - available to subscribers, on state bulletin board, in all local county offices	Rule notice published on web site Substance of rule in press releases 5/12/99, 5/14/99, 5/19/99, 5/21/99. Published in Dillon Tribune, Bozeman Chronicle, Missoulian, Billings Gazette, Helena Independent Record, Great Falls Tribune.
28 day comment period.	Commission began accepting comments at 5/14/99 meeting. (28 days until rule finalized)  Press release soliciting comments 5/19/99 (23 days until rule finalized)
Name address stating where comments may be sent.	Press release stated that comments should be addressed to Commission and gave address.

MAPA Administrative Rule Requirement	Biennial Rule Process
<p>Hearing not required unless requested by 10% of those affected or 25, whichever is more.</p>	<p><b>Three</b> public meetings allowing comment on plan: two commission meetings, one public hearing in Dillon.</p>
<p>Date, time and location of hearing published, if one is held. 20 day notice.</p>	<p>Public hearing/meeting notice given:</p> <ul style="list-style-type: none"> <li>• 7 day notice of Dillon public meeting.</li> <li>• 2 day notice of 5/14/99 Commission meeting (5/12/99 press release).</li> <li>• 12 day notice of 6/18 Commission meeting – agenda mailed to interested persons</li> <li>• 4 days notice of 6/18/99 meeting in 6/14/99 press release.</li> </ul>
<p>Publish substance or terms of new rule or show changes to existing on rule in notice</p>	<p>Substance of rule published in 5/14/99 and 5/21/99 press releases. Proposed rule and final published on FWP web site.</p>
<p>Rule notice paragraph explaining rule rationale</p>	<p>5/21/99 press release giving some background. 5/14/99 Commission meeting explaining background and rationale. Minutes mailed to interested persons.</p>
<p>As of 1999, email address not yet required by statute or rule on MAPA notice as a place to send comments.</p>	<p>Rule notice was posted on web site and had a hyperlink for individuals wishing to comment per Jim Burton, webmaster.</p>
<p>Paragraph advising individuals that agency keeps a list of interested persons and how to get on the list.</p>	<p>Con Ed list of individuals and groups (302 mailings) who receive mailed and email copies of all FWP news releases. The list includes new agencies, Montana Outfitters and Guides Assoc., Outdoor Guides Association.</p>

MAPA Administrative Rule Requirement	Biennial Rule Process
Rule cannot be adopted before 30 days or after 6 months from publication of rule notice.	Rule adopted 6/18. 37 days after 5/12 press release announcing rulemaking.
Adoption notice published not before 30 days and not after 6 months of proposal notice	Rulemaking announced in 5/12 press release.



**Attachment 6 – Letter from Governor Racicot to Chris  
Wester**



OFFICE OF THE GOVERNOR  
STATE OF MONTANA

RECEIVED

JUL 18 2000

FISH, WILDLIFE, & PARKS  
DIRECTOR'S OFFICE

MARC RACICOT  
GOVERNOR



STATE CAPITOL  
HELENA, MONTANA 59620-0801

July 17, 2000

Chris Wester  
Laurel Outlook  
P.O. Box 278  
Laurel MT 59044

Dear Mr. Wester:

Thank you for your letter regarding the Fish, Wildlife and Parks Commission's authority to regulate recreational conflicts on Montana's rivers and streams. I hope that the following information helps you to understand this law and how it is intended to work. You ask if I have reviewed the FWP Commission policy on recreational conflicts on rivers and whether this adequately addresses SB445. I have been provided a copy of the policy. I believe the Commission used a very complete and lengthy public involvement process to provide policy direction for the development of river recreation plans. As you are aware, they also adopted an interim rule while the two river advisory committees are completing their work.

I expect other rivers will be addressed in the future; however, the Beaverhead and Big Hole needed to be addressed now. It is my understanding the Commission policy is intended to give guidance in the development of plans, and rulemaking will follow or occur if necessary as part of adoption of the plans.

The authority from HB626 is: Under 87-1-303(2), the first sentence states that the Commission is given broad authority, to "adopt and enforce rules governing recreational use" of all public waters. The second sentence gives the criteria under which the rules can be adopted: "in the interest of public health, public safety, public welfare and protection of property and public resources." These criteria are very broad and encompassing.

In addition, this authority applies to "swimming, hunting, fishing, trapping, boating, including but not limited to . . ." and then gives a number of examples. The examples are not exclusive. The "swimming, hunting, fishing, trapping, boating" language covers almost any type of regulation on a river meeting the criteria of "public health, public safety, public welfare, etc." that the Commission determines is necessary. This would include commercial float trips and outfitter fishing trips. The authority is not limited to just conflicts between "motorized and nonmotorized users."

Chris Wester  
Page 2  
July 17, 2000

The criteria of "public welfare" and "protection of public resources" are the precise terms that granted broader authority to the Commission. These terms, in the context of the statutory language, give the Commission authority to promulgate a broad range of rule to regulate the recreational use of public waters. This authority includes any regulation that meets the criteria and regulates recreational use. This includes "commercial use based on recreational use of fishing and floating" and includes other regulations such as noncommercial floating and fishing, dates of use, times of use, types of watercraft allowed, etc.

You seek specific language, and certainly the legislature can provide more specific language. They can also provide broad language and allow the Commission to develop the specifics. Such delegation of authority is not unique, nor is the exercise of this authority improper. The Fish, Wildlife and Parks Commission has very broad authority to manage fish and wildlife populations, set seasons, etc. Every year they exercise that authority in a variety of complex and interrelated decisions after extensive public debate.

The grant of rulemaking authority is valid because the body with the necessary expertise has been delegated the job, the subject of the rulemaking is clear – "recreational use", and there are specific criteria or standards the rules must meet – "in the interest of public health, public safety, public welfare and protection of property and public resources."

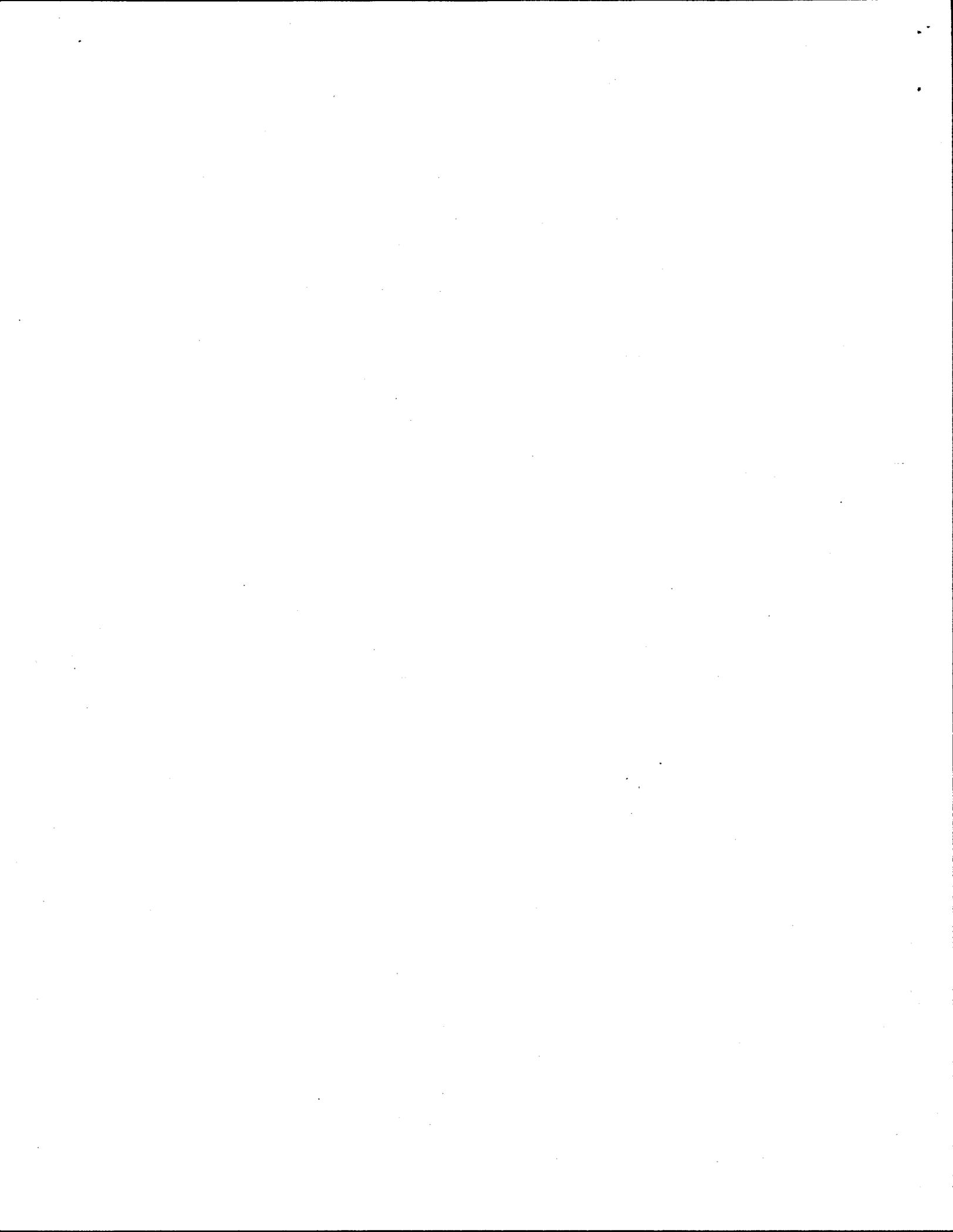
Thank you for the opportunity to answer your questions.

Sincerely,



MARC RACICOT  
Governor

Attachment 7 - Biennial Rule adopted February 2, 2001



**STATE OF MONTANA**

**FISH, WILDLIFE & PARKS COMMISSION**

**BIENNIAL RULE EFFECTIVE MAY 2, 2001 THROUGH MAY 1, 2003**

**REGULATION AND DISTRIBUTION OF RIVER RECREATION USE FOR THE  
BEAVERHEAD AND BIG HOLE RIVERS**

**I. STATEMENT OF LEGAL AUTHORITY FOR RULE**

Section 87-1-303, MCA, gives the Fish, Wildlife and Parks Commission (Commission) the authority to adopt and enforce rules governing recreational uses of public waters for public health, public safety, public welfare, protection of property, and the protection of public resources. Under § 87-1-303, MCA, the Commission has comprehensive authority to adopt rules addressing use conflicts on rivers such as the use conflicts posed on the Beaverhead and Big Hole rivers. The Commission is adopting these interim, recreational use rules as biennial rules authorized under the Montana Administrative Procedure Act, § 2-4-102 (11) (d), MCA.

**II. INTRODUCTION**

Because of increased user conflicts on the Beaverhead and Big Hole rivers, resource and property damage concerns, demands upon limited public facilities related to those use levels, and concerns over the quality of the recreational experience, the Commission finds it necessary to manage river recreational use on

the Beaverhead and Big Hole rivers. This biennial rule is a part of that management.

The Commission intends that management of use under this temporary, biennial rule will remain in place for the Beaverhead and Big Hole rivers until the Commission adopts a more permanent recreational resource management plan and implementing rules for each of these rivers. The Commission further intends to continue the development of management plans by considering the needs and impacts of river management on a state-wide basis as well as the particular individual needs and circumstances of the Beaverhead and Big Hole rivers. The Commission believes that this interim rule will give the Commission, the Department of Fish, Wildlife and Parks, other affected agencies, local governments and the public an opportunity to monitor and evaluate the regulations. In addition the interim rule will allow time to collect data and analyze the needs of and impacts on the river resources, the public, and state and local communities, including consideration of the carrying capacity of each river.

The Commission intends that this interim rule will not set a precedent for future management plan decisions and should not limit consideration of alternative solutions.

### III. REGULATION AND DISTRIBUTION OF USE ON THE BEAVERHEAD RIVER

A. Starting on the third Saturday in May through Labor Day, recreational use of the Beaverhead River from the Clark Canyon Dam to its mouth shall be allowed and restricted in designated river reaches as follows:

- (1) The river reach from the Clark Canyon Dam to the Henneberry Fishing Access Site is open to all fishing, including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 3 boats in any day.
- (2) The river reach from the Henneberry Fishing Access Site to Barretts Diversion is open to all fishing, including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 3 boats in any day.
- (3) The river reach from Barretts Diversion to the Highway 91 South (Tash) Bridge is open to all fishing, including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 1 boat in any day.
- (4) The river reach from the Highway 91 South (Tash) Bridge to Selway Bridge is closed to any float outfitting from the third Saturday in May through Labor Day.
- (5) The river reach from Selway Bridge to Jessen Park in Twin Bridges is open to all fishing, including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 1 boat in any day.

B. Starting on the third Saturday in May through Labor Day, there is a noncommercial residents' day on each Saturday on the river reach from High

Bridge Fishing Access Site to the Henneberry Fishing Access Site and on each Sunday on the river reach from Henneberry Fishing Access Site to Pipe Organ Fishing Access Site. No float fishing by nonresidents or float outfitting is allowed during each noncommercial residents' day.

- C. By this paragraph, the Commission intends to limit outfitter use during peak periods. Each outfitter, from July 1 through August 31 inclusive, shall not exceed the number of client days served by the outfitter on the Beaverhead River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the Board of Outfitters will determine the number of client days outfitted in each year.
- D. For the purpose of this rule, float fishing by nonresidents and float outfitting includes both fishing from a boat and wade fishing when access is by boat. The terms do not include wade fishing, either guided or non-guided, where access is gained by foot. Float outfitting is the operation of any boat for commercial purposes by a fishing outfitter or guide.

#### IV. REGULATION AND DISTRIBUTION OF USE ON THE BIG HOLE RIVER

- A. Starting on the third Saturday in May through Labor Day, recreational use of the Big Hole River from its headwaters to the High Road Fishing Access Site shall be allowed and restricted by defining seven river zones with one zone closed to float outfitting each day and with the zone that is restricted on Saturday and the zone

that is restricted on Sunday also closed to nonresident float fishing. The seven river zones are defined by a river reach and restricted each day of the week as follows:

- (1) On each Sunday, the river reach from the Divide Fishing Access Site to the Salmon Fly Fishing Access Site at Melrose is closed to any float fishing by nonresidents and to any float outfitting.
- (2) On each Monday, the river reach from the Salmon Fly Fishing Access Site to the Glen Bridge Fishing Access Site is closed to any float outfitting.
- (3) On each Tuesday, the river reach from the headwaters to the Fishtrap Fishing Access Site is closed to any float outfitting.
- (4) On each Wednesday, the river reach from the Notch Bottom Fishing Access Site to High Road Fishing Access Site is closed to any float outfitting.
- (5) On each Thursday, the river reach from the Fishtrap Fishing Access Site to the Jerry Creek Fishing Access Site is closed to any float outfitting.
- (6) On each Friday, the river reach from the Glen Bridge Fishing Access Site to the Notch Bottom Fishing Access Site is closed to any float outfitting.
- (7) On each Saturday, the river reach from Jerry Creek Fishing Access Site to the Divide Fishing Access Site is closed to any float fishing by nonresidents and to any float outfitting.

- B. All float users, including each float outfitter, are limited to a total of 2 launches at or near each official access site per day. Official access sites are those that are publicly owned, managed and maintained as an access point, including: High Road, Pennington, Notch Bottom, Glen, Brownes Bridge, Salmon Fly at Melrose, Maiden Rock FWP, Maiden Rock BLM, Divide, Power House, Dewey, Jerry Creek, Mallons, Dickie Bridge, Eastbank, Sportsmans Park, Fishtrap, and Mudd Creek Bridge fishing access sites. If a boat is launched at an unofficial site, the launch will be counted as occurring at the nearest official site in determining the two-boat limit at or near each official access site.
- C. By this paragraph, the Commission intends to limit outfitter use during peak periods. Each outfitter, from June 1 through July 31 inclusive, shall not exceed the number of client days served by the outfitter on the Big Hole River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the Board of Outfitters will determine the number of client days outfitted in each year.
- D. For the purpose of this rule, float fishing by nonresidents and float outfitting includes both fishing from a boat and wade fishing when access is by boat. The terms do not include wade fishing, either guided or non-guided, where access is gained by foot. Float outfitting is the operation of any boat for commercial purposes by a fishing outfitter or guide.

V. CONTINUATION OF OUTFITTER MORATORIUM ON THE BEAVERHEAD AND BIG HOLE RIVERS

For the term of this biennial rule, the moratorium on new outfitter use of the Beaverhead and Big Hole rivers imposed in the biennial rule effective July 1, 1999 through May 1, 2001, that was adopted June 29, 1999, and amended on January 12, 2000, is continued.

Under this rule the Commission asserts that the use of a public resource is a privilege, not a right, and that continuation of the moratorium does not in any way establish a compensable or transferable property right by the outfitters benefiting from the moratorium. The moratorium provides that a person, subject to the use limitations in III.C. or IV.C., may not outfit on the Beaverhead or Big Hole rivers except:

- A. An outfitter with documented use of the Beaverhead River prior to December 31, 1998, may continue to operate on this river.
- B. An outfitter with documented use of the Big Hole River prior to December 31, 1998, may continue to operate on this river.
- C. An outfitter who has not documented use of the Beaverhead River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and July 1, 1999, and his/her operating plan included the Beaverhead River.
- D. An outfitter who has not documented use of the Big Hole River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and July 1, 1999, and his/her operating plan included the Big Hole River.

VI. CONDITIONS AND REQUIREMENTS FOR BOTH RIVERS

- A. In the event of the death of an outfitter who has an opportunity to outfit on the Big Hole and Beaverhead rivers, as outlined in this rule, that opportunity may be assumed by a member of the immediate family of the deceased outfitter. This provision does not supercede the outfitter licensing requirements and authority of the Board of Outfitters. No other transfers will be permitted for the opportunity to outfit on the Big Hole and Beaverhead rivers, as outlined in this rule.
- B. All outfitters given the opportunity to operate on the Big Hole and Beaverhead rivers, as outlined in this rule, will be issued boat tags that will identify them as authorized by the Montana Fish, Wildlife and Parks Commission to operate on the Big Hole and Beaverhead rivers. These boat tags must be displayed on all authorized outfitter boats when operating on the Big Hole and Beaverhead rivers.

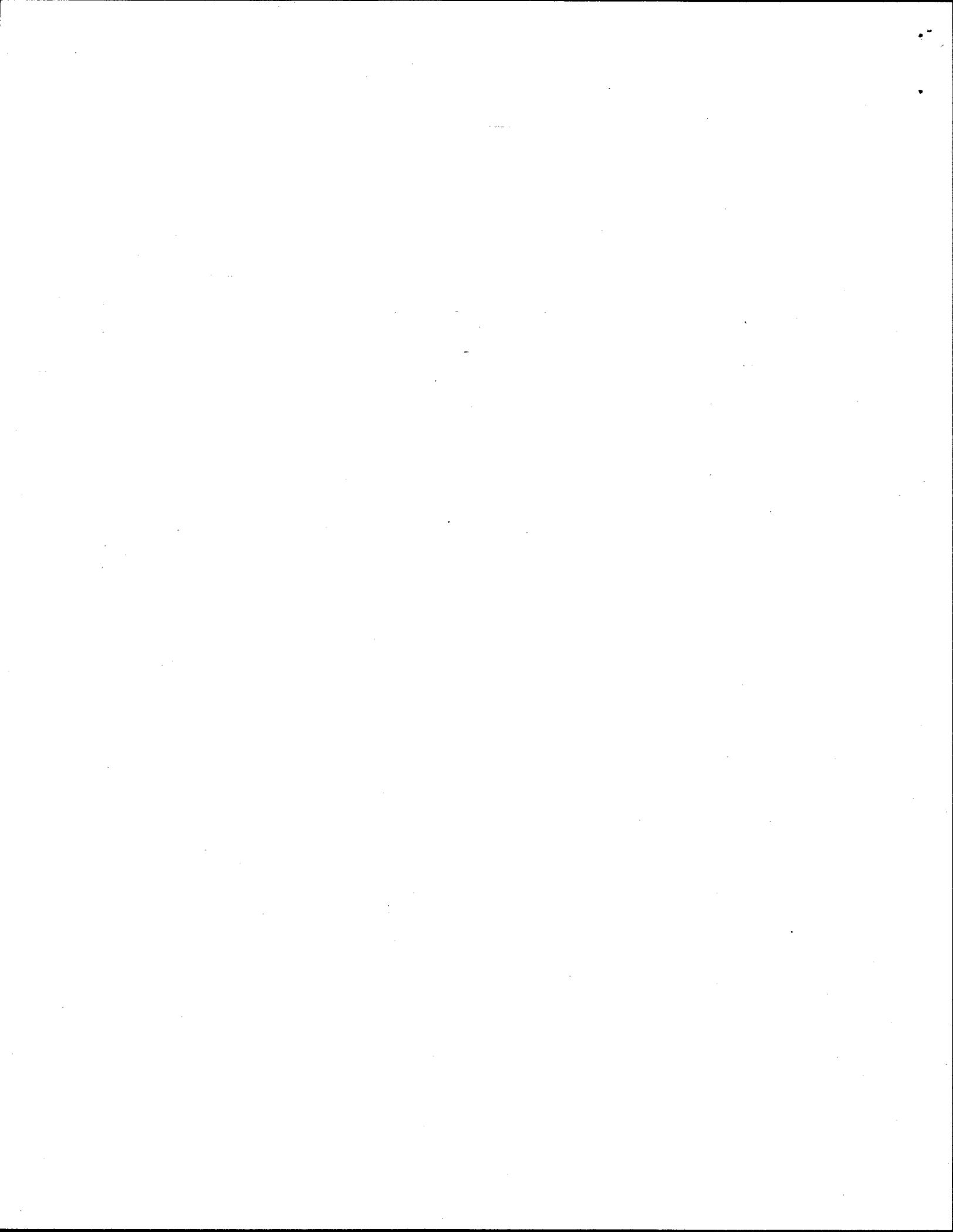
VII. EFFECTIVE DATES OF THESE RULES

These rules are effective from May 2, 2001 through May 1, 2003.

This rule was adopted by the Fish, Wildlife and Parks Commission on February 9, 2001.

  
M. JEFF HAGENER, Secretary  
Fish, Wildlife & Parks Commission

**Attachment 8 - Timeline and Public Process  
for Adopting 2001 Rule**



## 2001 Biennial Rule

MAPA Administrative Rule Requirements	Biennial Rule Process
<p>Bill sponsor notification when rulemaking begins.</p>	<p>1999 veto of SB 445 and governor's request to have FWP begin rulemaking. Sponsors of the vetoed bill aware of rulemaking.</p>
<p>Rule notice mailed within three days of publication to individuals on agency's interested persons list. Bill sponsor of code section implemented notified the first time rulemaking is done on code section.</p>	<p>All press releases mailed or emailed to list of over 300 groups and persons. Outfitting trade associations included on list.</p> <p>Press releases in newspapers announcing proposed rulemaking and meetings.</p>
<p>Rule proposal notice published in the Montana Administrative Register - available to subscribers, on Sec. Of State web site, in all local county offices.</p>	<p>Press release 10/11/2000 announcing management plans available for public review. Published in Dillon and Butte papers and other papers throughout the state.</p> <p>Executive Summaries of 30 page document available on web site, by email or mailed from fisheries. Comment solicited.</p> <p>2001 Biennial Rule substance summarized in 1/5/2000 press release. Published on web site 1/5/2000, available by mail from FWP. Comment solicited.</p> <p>June 2000 newsletter distributed to 2500 individuals and groups. Four page newsletter explained planning process, included vision statements and problem statements, maps, and explained biennial rules. Names and phone numbers of all committee members in newsletter. See attached copy of newsletter.</p>
	<p>In addition: 2 citizen's advisory groups formed by FWP, one for each river. Candidates nominated by Big Hole Watershed groups and Beaverhead forum. Committee members chosen by director to represent all interests on the rivers.</p>

MAPA Administrative Rule Requirements	Biennial Rule Process
	FWP contracted with Montana Consensus Council to design public agreement-building process to guide committees' work.
	Beaverhead and Big Hole Advisory Committee meetings began as early as 11/99. Public comment period at each meeting. Meetings held at least monthly and more often from 10/2000 through 2/2001.
28 day comment period	<p>Comment period - advisory committee plans: Announced in 10/11 press release. Deadline 11/13. <b>31 days</b></p> <p>Comment period of biennial rule. Press release 1/5/01 through 2/2/01 deadline. <b>28 days</b></p>
Name and address in rule notice stating where comments may be sent.	Press release 1/5/2001 giving address where public comment should be sent. Document posted on FWP web site with comment hyperlink.
Hearing not required unless requested by 10% of those affected or 25, whichever is greater.	<p>Two public meetings announced in Butte and Dillon on draft plan.</p> <p>Two public meetings announced in Butte and Dillon on biennial rule.</p>
Date, time and location of hearing published, if one is held. 20 day notice.	<p>Draft plan public meetings announced in 10/11/2000 press release:</p> <ul style="list-style-type: none"> <li>• Butte 5 day notice.</li> <li>• Dillon 6 day notice.</li> </ul> <p>Public hearings on 2001 biennial rule announced in 1/5/2001 press release:</p> <ul style="list-style-type: none"> <li>• Dillon 17 days notice.</li> <li>• Butte 18 days notice.</li> </ul>

MAPA Administrative Rule Requirements	Biennial Rule Process
Publish substance or terms of new rule in rule proposal notice.	Text of rule notice attached to 1/5/2001 press release. Substance of rule also included in the release.
Paragraph in rule notice explaining rule rationale.	Rule rationale explained in press releases starting in 1999. Addressed in management plans also.
Email address of person receiving comments.	Rule notice was posted on web site which had a hyperlink for individuals wishing to comment via internet.
Paragraph advising individuals that agency keeps a list of interested persons and how to get on the list.	Con Ed list of individuals and groups (302 mailings) who receive mailed and email copies of all FWP news releases. The list includes new agencies, Montana Outfitters and Guides Assoc., Outdoor Guides Association.
All comments read or heard. Negative comments responded to in rule adoption notice.	<p>Comments on Draft Plans:</p> <ul style="list-style-type: none"> <li>• As of 11/9/2001, 24 comments.</li> <li>• Commission reviewed comments.</li> <li>• Based on comments and other concerns, a long term solution such as adopting the draft plans, was not feasible until more experience and information was gathered.</li> </ul> <p>Comments on Biennial rule:</p> <ul style="list-style-type: none"> <li>• Alternative "reach" proposal designed by public through petition process presented and discussed. Commission incorporated "reach" plan into rule.</li> <li>• All comments read or heard. Comments summarized at February Commission meeting.</li> <li>• 150 individual comments.</li> <li>• 341 signatures on Beaverhead petition promoting "reach" proposal.</li> <li>• New rule incorporating "reach" proposal sent out for public comment. (cont.)</li> </ul>

MAPA Administrative Rule Requirements	Biennial Rule Process
	<p>Reasons for compromise which resulted in adoption of 2001 rule explained in 3/14/2001 press release and December 14 &amp; 15 and February 9 Commission meeting minutes. Commission minutes sent after every meeting to individuals who request to have their names on a list.</p>
<p>Rule cannot be adopted before 30 days or after 6 months from publication of rule notice.</p>	<p>Rulemaking process began with adoption of temporary biennial rule in June of 1999. Process on-going. Last rule action 2/9/01 with current biennial rule adoption by the commission. <b>19 months.</b></p>
<p>Rule adoption notice published within 30 days and 6 months of proposal. Any changes from the proposed rule shown in adoption notice.</p>	<p>Press releases 3/14/2001 and 3/16/2001 announcing adoption of rule. Substance of rule given in both press releases</p>

# River Recreation Planning Update

Spring 2000

Page 1

## River Recreation Planning Underway on Big Hole and Beaverhead Rivers

At the request of local citizens, the Montana Fish, Wildlife and Parks Commission initiated parallel processes to develop river recreation plans for the Big Hole and Beaverhead rivers. The Commission issued a biennial rule in June 1999 outlining the purpose and scope of the planning effort (see page 4). The Department of Fish, Wildlife and Parks then contracted with the Montana Consensus Council to help organize broad-based citizen advisory committees for each river.

The committees include representatives of the various interests surrounding river recreation in southwestern Montana, including fish and wildlife advocates, outfitters and guides, local watershed groups, recreation-related businesses, landowners, agricultural interests, and local government (see list on page 4). Both committees have been meeting monthly since October 1999 to review river use data and develop vision and problem statements to guide the plans. This spring they are drafting recommended strategies for managing recreational use on the two rivers.

The draft recreation resource management plans for each river are scheduled to be completed and submitted to the Commission by December 1, 2000.

## Understanding the Planning Process

The biennial rules issued by the FWP Commission call for a "group of interested parties... to participate in a public process" for addressing recreation conflicts on the Beaverhead and Big Hole rivers. The rules also state that this group will "advise" DFWP in developing the plans for each river. To meet these criteria, DFWP convened a citizen's advisory committee for each river and contracted with the Montana Consensus Council to design an agreement-building process to guide the committees' work.

The Consensus Council drafted a suggested work plan and ground rules that were reviewed, revised, and adopted by each committee. The work plan describes the purpose and scope of the public process, documents how the committees were formed (see the list of committee members on page 4), and sets planning objectives and tasks for the committees. The work plan also includes an outline for the management plans.

The ground rules describe the roles and responsibilities of the people and agencies participating in the planning process. One section also describes the decision-making process, a form of negotiated agreement building. The advisory committees were formed to include all of the interests affected by recreation management on the Beaverhead and Big Hole. Each committee member is committed to seeking agreement, which is defined as agreement among all participants on a package of provisions that address the range of issues being discussed. Rather than voting on ideas or proposals, committee members build agreement by identifying their interests and concerns, identifying problems, offering constructive solutions, asking questions, exploring options, and, finally, agreeing on proposals that satisfy their interests. Each member can disagree with any proposal, but then he or she assumes an automatic responsibility to offer a

constructive alternative that seeks to accommodate all affected interests. If an impasse is reached, the committee will meet with DFWP and the Commission to explore options on how to proceed.

Advisory committee meetings are open to the public and are managed by private facilitators on contract with DFWP. The facilitators enforce the ground rules, ensuring that people participate in good faith. They keep the group on track, manage relationships and communications for fairness and efficiency, and help the committees find solutions that satisfy as many interests as possible.

The Montana Consensus Council serves as a project coordinator, providing ongoing consultation and advice, and monitoring progress. The Council also manages a coordinating committee that integrates and coordinates the work of the two advisory committees as needed. The coordinating committee includes two members from each advisory committee, the facilitators, and representatives of DFWP.

DFWP and the project coordinator will draft the plans based on recommendations provided by the advisory committees. The draft plans will be submitted to the Commission and the public for review, with a 30-day comment period, in October 2000. Then the plans will be revised based on public comments and reviewed by the advisory committees and DFWP. The deadline for submitting the final plans to the Commission is December 1, 2000.

For a complete copy of the biennial rule, go to <http://fwp.state.mt.us> and click on "recreation."

## Beaverhead River

The following vision and problem statements—in no order of importance—have been tentatively agreed upon by members of the Beaverhead Advisory Committee pending further information gathering, including public review and input.

### Beaverhead Vision Statements

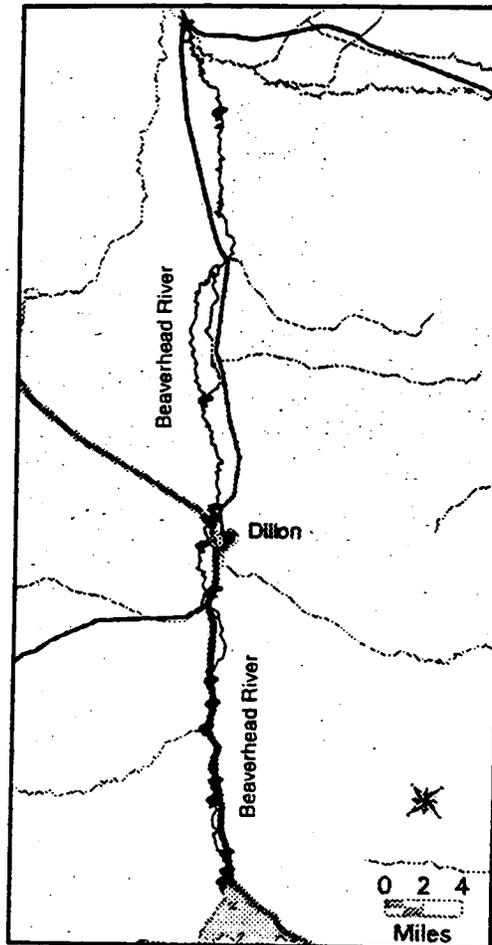
1. The Beaverhead River Recreation Management Plan shall be developed from broad-based public input, the ideas and counsel of technical advisors, with free and open dialogue and consensus among committee members.
2. The plan will reflect fair and equitable consideration of all the stakeholders. It will be based on the principle that the use and enjoyment of public resources remain available to all. Private property along the river will be protected from impacts of recreation use, to the extent possible.
3. The resulting plan will address the problems and concerns agreed upon by the committee; be implementable, enforceable, and fiscally responsible. Recommended sources of funding to pay for plan implementation and monitoring shall accompany the recommendations of the committee. The plan will reflect the counsel of those persons or agencies that will be responsible for implementation and enforcement of its provisions.
4. The implementation of this plan will result in enhancing the quality of recreational experience and protecting natural resources for all those who enjoy the Beaverhead River, while recognizing and maintaining the numerous ways the river contributes to the local economy.

### Beaverhead Problem Statements

Increased use is diminishing the quality of the experience on the river.

- Is there an unbalanced amount of commercial use or non-commercial use at certain times or on specific reaches?
- No regulations on guides or outfitters (on commercial use).
- Increased boat fishing.
- Hot spotting by independent contractors and others.
- Increased non-resident use.
- Use is unevenly distributed—some seasons and sections of river are more overcrowded than others.
- Competition between boats and bank anglers.

- Increased use by different types of floaters.
- Increased use by non-fishing floaters—adds to overcrowding.
- An unknown carrying capacity.
- Conflicts among different types of use.
- A lack of river etiquette and need for education.



Increased use is diminishing the quality of the fishery and other natural resources.

Specific concerns include:

- Spread of weeds by recreational water users.
- Impacts on public resource values and the ecosystem (erosion, birds, etc.).
- Dust on frontage road diminishes air quality.
- Human waste and littering.
- Impacts on riparian areas.

Increased commercial use benefits the local economy but may potentially contribute to the decline in the quality of experience due to an overall increase in use.

- Other area industries depend on the quality of life and experience in the Beaverhead watershed.

There is no institutional framework to manage river recreation.

- Clarify role of DFWP, Board of Outfitters, and federal land managers.
- Provide funding for management activities (such as enforcement).
- Determine how to protect private property rights against trespassing and other problems.

Existing data on river recreation use is incomplete.

- We don't yet have statistics from opening day to June 30.
- Existing data is limited to: July through October and selected stretches of river (Barrett's diversion to Clark Canyon Dam).
- A system to monitor and evaluate the management plan is needed.
- Adopt the principle of adaptive management.

## Big Hole River

The following vision and problem statements—in no order of importance—have been tentatively agreed upon by members of the Big Hole Advisory Committee pending further information gathering, including public review and input.

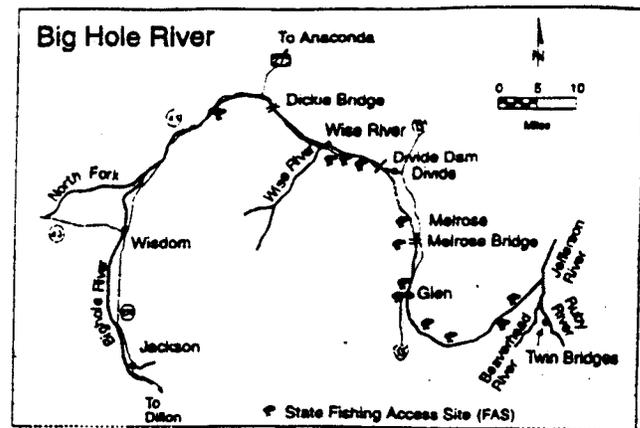
## Big Hole Vision Statements

1. There should be opportunities for some reasonable level of solitude, quality fishing, and high quality resource-driven recreation.
2. Recreation happens in a manner that does not adversely affect local communities and agriculture and enhances and preserves resource integrity of the basin for future generations.
3. Recreational use does not overburden the river corridor, public and private facilities, endanger the fishery or water quality.
4. Recreational use is distributed more uniformly throughout the basin by enhancing the resource.
5. The following values are preserved in the future: recreation participants respect users and the resource, there is little or no conflict between users or uses, opportunity for recreational boating enjoyment, individual and group relaxation and an opportunity for physical challenge and spiritual rejuvenation.
6. Re-establish resident and non-resident use patterns.
7. Recreational users and youth are educated on ethics, appropriate behavior and protocols.
8. The Department of Fish, Wildlife and Parks has an ongoing high standard of maintenance of the resource with regard to the biological and social needs and limits.

## Big Hole Problem Statements

Residents perceive a diminished quality of experience due to:

- Increased commercial use.
- Increased non-resident use.
- The displacement of wade anglers.
- Too many boats in popular sections during peak times.
- The large size of individual boating groups.
- Negative impacts on the resource (e.g., spread of noxious weeds).



The concentration of river use is a problem because:

- There are too many boats in popular sections during peak times.
- Wade anglers are displaced.
- The resource is negatively impacted (e.g., the spread of noxious weeds).

The impacts of river use cause environmental, economic, and social problems including:

- The cost of infrastructure maintenance, repair, and development.
- The cost of access points maintenance, repair and development.
- The cost of road/transportation maintenance, repair, and development.
- Reduced water quality.
- Reduced value of the resources (waste, weeds, trash).
- Reduced health of the resources.
- Increased stress on fish and wildlife.
- Conflicts due to lack of education on sportsman-like behavior and protocol.

## FWP Commission Biennial Rules

On June 29, 1999, the Fish, Wildlife and Parks Commission issued biennial rules on the distribution of recreational use on the Beaverhead and Big Hole rivers. The rules distribute outfitter use on these rivers and describe the Commission's policy for developing recreation resource management plans and rules for the two rivers.

As outlined in the biennial rules, the purpose of the planning process is to:

- Facilitate a group of interested parties from within each watershed and across the state to participate in a public process for addressing conflicts on the Beaverhead and Big Hole rivers.
- Advise DFWP in the development of recreation resource management plans for the Beaverhead and Big Hole rivers.

The rules also set the following sideboards on the planning effort:

- A. The proposed recreation resource management plans should not base commercial floating opportunity on historical use.
- B. No element of the plans should create vested property rights for commercial operators.

- C. Interim management decisions will not set a precedent for future management plan decisions and should not limit consideration of alternative solutions.
- D. The management plans should seek to develop options that are cost-effective and the least regulatory to address the problem.
- E. DFWP will present recommended recreation resource management plans to the Commission no later than December 1, 2000.

The historical use and property rights issues (sideboards A and B) have sparked an ongoing debate among members of the advisory committees and the public at large. Those in favor of the Commission's sideboards argue that outfitters and guides should not be given any advantage over the public for the use of a public resource (the rivers). Commercial operators, on the other hand, say that their businesses will suffer without some assurance of access to the rivers from season to season and year to year. The advisory committees must weigh these competing interests as they work to develop management strategies for the two rivers.

## Advisory Committee Members

Advisory committee members represent a cross section of the interests affected by recreation management on the Beaverhead and Big Hole rivers. Candidates were nominated by the interests they represent and final members were selected by DFWP.

If you have comments or concerns you want to see addressed by either committee, please contact the facilitator or the member who best represents your interests.

### Beaverhead River Advisory Committee

Name	Affiliation	Home	Phone
Bill Allen	BOA	Dillon	683-4796
Jay Chamberdin	Irrigation District	Dillon	683-2307
Robin Cunningham	FOAM	Gall. Grwy	763-5436
Robbie Garrett	BCCF	Dillon	683-2329
Ray Gross	Unaffil. sportsmen	Dillon	683-2046
Monty Hankinson	BBHOGA	Dillon	683-4579
Robert Hartwell	Small business; BOA	Dillon	683-5565
Garth Haugland	Local Gov't	Dillon	683-6357
John Kober	MWF	Helena	458-0227
Annette McLean	TU	Twin Bridges	684-5747
Tom Rice	Landowner	Dillon	683-4831
Mike Whittington	TU	Billings	254-9447
Lorie Higgins	Facilitator	Melrose	835-2067

Higgi@wsunix.wsu.edu

2,500 copies of this public document were published at an estimated cost of 27¢ per copy, for a total cost of \$675.00, which includes \$675.00 for printing and \$0.00 for distribution.

## Big Hole River Advisory Committee

Name	Affiliation	Home	Phone
Jim Belsey	Non-local angler	Bozeman	586-1782
Judi Coulombe	Non-angling rec.	Butte	494-6611
Robin Cunningham	FOAM	Gall. Grwy	763-4761
Dave Decker	BBHOGA	Butte	832-3175
Matthew Greemore	Small business/TU	Twin Bridges	684-5639
Mark Kambich	Landowner	Divide	267-3335
John Kober	MWF	Helena	458-0227
Steve Luebeck	Public Lands Access; Anaconda sportsmen	Butte	494-6216
Pat Munday	Big Hole Riv. Found.	Walkerville	496-4461
Scott Reynolds	TU	Anaconda	797-3361
Randy Smith	BHWC	Glen	835-3451
Jennifer Dwyer	facilitator	Bozeman	994-0251

### Abbreviations:

BBHOGA - Beaverhead and Big Hole Outfitters and Guides Association  
 BCCF - Beaverhead County Community Forum  
 BOA - Beaverhead Outdoors Association  
 FOAM - Fishing Outfitters Association of Montana  
 MWF - Montana Wildlife Federation  
 TU - Trout Unlimited

The following groups have contributed financially to this planning process: Big Hole Foundation, Big Hole Watershed Committee, Beaverhead County Community Forum, Lewis & Clark and George Grant Chapters of Trout Unlimited Beaverhead and Big Hole Outfitters and Guides Association, and area sportsmen organizations.



## Montana Fish, Wildlife & Parks

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# 1999 Montana Legislature

## About Bill -- Links

HOUSE BILL NO. 626

INTRODUCED BY H. HARPER, J. ELLINGSON



AN ACT REDUCING POTENTIAL CONFLICTS BETWEEN RECREATIONAL USERS OF MONTANA WATERS BY REVISING CERTAIN LAWS ON MOTORBOAT AND PERSONAL WATERCRAFT OPERATION; REVISING THE RESTRICTION ON OPERATION OF A VESSEL IN PROXIMITY TO AN ANGLER, WATERFOWL HUNTER, OR DIVER; DESIGNATING CERTAIN RIVER STRETCHES AS NO-WAKE ZONES; PROHIBITING THE USE OF PERSONAL WATERCRAFT ON DESIGNATED RIVER STRETCHES AND ON WATERS RESTRICTED BY RULE OF THE FISH, WILDLIFE, AND PARKS COMMISSION; ALLOWING THE FISH, WILDLIFE, AND PARKS COMMISSION TO ADOPT RULES FOR THE OPERATION OF PERSONAL WATERCRAFT AND THE RESOLUTION OF CONFLICTS BETWEEN USERS OF MOTORIZED AND NONMOTORIZED BOATS ON MONTANA WATERS; AND AMENDING SECTIONS 23-2-525, 23-2-531, AND 87-1-303, MCA; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 23-2-525, MCA, is amended to read:

**"23-2-525. Restricted areas.** (1) ~~No~~ A person shall so may not anchor a vessel or other obstacle for fishing or pleasure purposes on any body of water over which the state has jurisdiction in ~~such~~ a position ~~as to obstruct that obstructs~~ a passageway ordinarily used by other vessels.

(2) ~~No~~ A person shall may not operate a pleasure vessel within 20 feet of the exterior boundary of a water area which ~~that~~ is clearly marked by buoys or some other distinguishing device as a bathing or swimming area. Swimming areas ~~shall~~ must be marked with white buoys having international orange markings in conformance with the uniform state waterway marking system by the owners of ~~such the~~ areas.

(3) ~~No~~ A person shall may not, without permission, operate or knowingly permit any person to operate a vessel within ~~50~~ 75 feet of a person engaged in fishing ~~or hunting waterfowl~~, unless unavoidable. If unavoidable, the vessel must be operated at not greater than no-wake speed or at a minimum speed necessary to maintain upstream progress while within 75 feet of the person engaged in fishing or hunting waterfowl.

(4) (a) ~~No~~ A person shall may not purposely, knowingly, or negligently operate a motorboat upon the waters of this state within ~~100~~ 200 feet of a tow-float or buoy displaying a "diver-down" symbol, red with a white slash, on a flag.

(b) The motorboat may enter the ~~100-foot~~ 200-foot safety zone by use of sail or oar. In an emergency or if there is insufficient water on either side of the ~~100-foot~~ 200-foot safety zone to pass by and stay out of the zone, the operator may use power within the zone but may not exceed no-wake speed. The burden of proving that an emergency exists or that there is insufficient water is on the operator.

(c) The fish, wildlife, and parks commission may by rule determine areas where establishment of a ~~100-foot~~ 200-foot safety zone is not allowed in order to provide for diver safety or the regulation of water traffic."

**Section 2.** Section 23-2-531, MCA, is amended to read:

**"23-2-531. Personal watercraft operation.** In addition to applicable provisions in this part, a person may not operate a personal watercraft:

(1) unless a person operating or riding on the vessel is wearing a United States coast guard approved type I, II, III, or V personal flotation device;

(2) if the vessel is equipped by the manufacturer with a lanyard type engine cutoff switch unless the lanyard is attached to the operator's person, clothing, or personal flotation device as is appropriate for the specific vessel;

(3) (a) except as provided for standup personal watercraft in subsection (3)(b) or when towing a waterskier from or to a dock or shore, at greater than no-wake speed within ~~100~~ 200 feet of a dock, swimmer, swimming raft, nonmotorized boat, or anchored vessel on a lake or ~~within 50 feet of a dock~~;

~~swimmer, swimming raft, nonmotorized boat, or anchored vessel on a river, except as provided in 23-2-525(4) river; or~~

(b) at greater than ~~minimum maneuvering speed for a standup~~ the minimum speed necessary to operate a personal watercraft when leaving or returning directly from or to a dock or shore for the purpose of launching or docking; or

(4) on any surface waters restricted in whole or in part by rule of the fish, wildlife, and parks commission;

(5) in a reckless or negligent manner. Actions prohibited in 23-2-523 are considered reckless operation."

**Section 3.** Section 87-1-303, MCA, is amended to read:

**"87-1-303. Rules for use of lands and waters.** (1) The commission may adopt and enforce rules governing uses of lands that are acquired or held under easement by the commission or lands that it operates under agreement with or in conjunction with a federal or state agency or private owner. The rules must be adopted in the interest of public health, public safety, and protection of property in regulating the use of these lands. All lease and easement agreements must itemize uses as listed in 87-1-209.

(2) The commission may adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and lakes that it operates under agreement with or in conjunction with a federal or state agency or private owner. These rules must be adopted in the interest of public health, public safety, public welfare, and protection of property and public resources in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor-driven boats, the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats, waterskiing, surfboarding, picnicking, camping, sanitation, and use of firearms on the reservoirs, lakes, rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers, and streams. Areas regulated pursuant to the authority contained in this section must be areas that are legally accessible to the public. These rules are subject to review and approval by the department of public health and human services with regard to issues of public health and sanitation before becoming effective. Copies of the rules must show that endorsement."

**Section 4. Designation of certain river stretches as no-wake waters -- personal watercraft use prohibited.** (1) In the interest of public health, safety, welfare, and protection of property and public resources, the use of personal watercraft is prohibited on the headwaters of the Missouri River downstream to its confluence with Prewett Creek, except in Missouri River reservoirs, and including all tributaries but not their reservoirs.

(2) The waters from Hauser dam downstream to Beaver Creek are limited to a controlled no-wake speed.

(3) This section does not apply to the use of the designated waters for search and rescue, official patrol, or scientific purposes.

(4) This section may not be construed to limit the authority of the commission or department to enact by administrative rule or to enforce any other restrictions on any surface waters in the interests of public health, safety, welfare, or protection of property or public resources or the resolution of conflicts between users of motorized and nonmotorized boats.

**Section 5. Codification instruction.** [Section 4] is intended to be codified as an integral part of Title 87, chapter 1, part 3, and the provisions of Title 87, chapter 1, part 3, apply to [section 4].

**Section 6. Effective date.** [This act] is effective June 1, 1999.

- END -

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**Latest Version of HB 626 (HB0626.ENR)**  
Processed for the Web on April 23, 1999 (2:21PM)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted. See the status of the bill for the bill's primary sponsor.

[Status of this Bill](#) | [1999 Session](#) | [Leg. Branch Home](#)  
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Prepared by Montana Legislative Services  
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